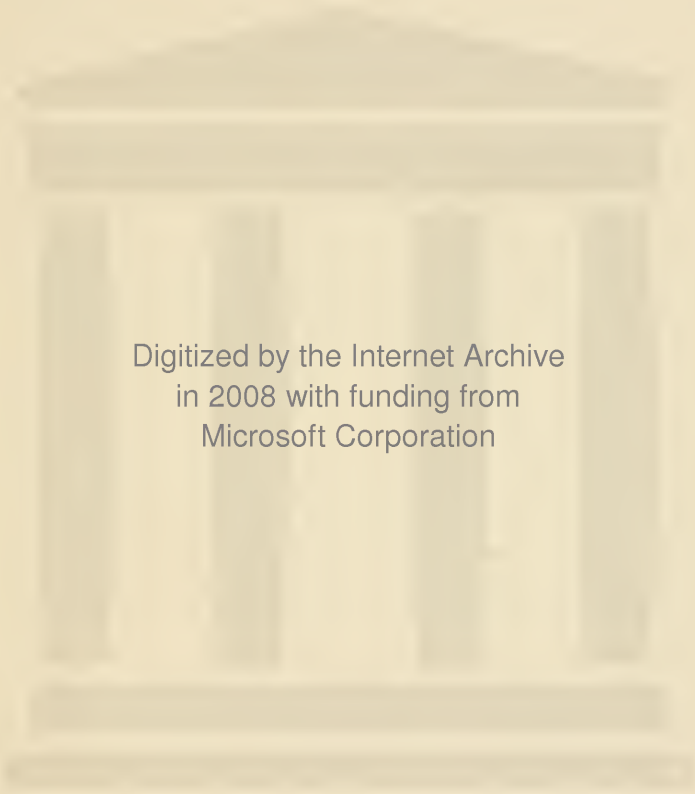
NEW METHODS OF ADJUSTING INTERNATIONAL DISPUTES AND THE FUTURE

SIR THOMAS BARCLAY



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BY

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"PROBLEMS OF INTERNATIONAL PRACTICE AND DIPLOMACY"

"LAW AND USAGE OF WAR" ETC.

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DEDICATED

TO

MY FRIEND AND FELLOW-CITIZEN OF DUNFERMLINE

ANDREW CARNEGIE

WHOSE WORK IN THE CAUSE OF LAW, AMITY

AND PEACE AMONG NATIONS

HAS EARNED

THE GRATITUDE OF MANKIND

PREFACE

THE present volume is intended to meet a want which has long been felt. There is no English book dealing with Arbitration and the other Pacific Methods of adjusting International disputes and differences as a part of the political system of nations, or endeavouring to determine the scope and limitations of these methods. In this volume an attempt is made to show in what respect they form part of the existing diplomatic machinery and the direction in which they are susceptible of development.

Arbitration is frequently appealed to, on the one hand, and condemned, on the other, as if the last words for and against it were that it is, should be or cannot be a substitute for war. It will be seen in this volume that, without exaggerated expectations, arbitration and the other methods which have been co-ordinated by the Hague Conferences serve many purposes which narrow the area of international dissension.

As regards the failure of peace methods in connection with the present war, the first sug-

gestion of mediation, by a strange contrast to her ultimate attitude, came from Germany. As Sir Edward Grey records in a dispatch to Berlin,[1] the German ambassador had told him that it would be a very desirable thing if Russia could act as a mediator with regard to Serbia. Four days later, Sir Edward Grey suggested at Berlin that simultaneous and joint action by Germany, Italy, France and Great Britain at Vienna and Petersburg might have a "mediating or moderating influence."[2] Then, on July 28, Austria-Hungary declared war against Serbia. Even, in spite of this precipitation, efforts to arrive at an effective mediation were continued by Sir Edward Grey on behalf of Great Britain, and by Herr von Bethmann-Hollweg, as he alleged, through the German ambassador in London, on behalf of Germany. It is certain that Great Britain, France and Italy were prepared to offer mediation in conjunction with Germany down to as late as July 29.

Germany objected, we then learn from Italy, to the mediation of the four Powers,[3] and on the same date (July 29) the German ambassador assured Sir Edward Grey that the German Chancellor was working in the interest of mediation at Vienna and Petersburg.[4]

[1] July 20, 1914.
[2] Sir Edward Grey to Berlin, July 24, 1914.
[3] Sir Edward Grey to Rome, July 29, 1914.
[4] Sir Edward Grey to Berlin, July 29, 1914.

Then Sir Edward Grey authorised Sir Edward Goschen to make the following statement at Berlin :

> And I will say this : If the peace of Europe can be preserved and the present crisis safely passed, my own endeavour will be to promote some arrangement to which Germany could be a party, by which she could be assured that no aggressive or hostile policy would be pursued against her or her allies by France, Russia and ourselves, jointly or separately. I have desired this and worked for it, as far as I could, through the last Balkan crisis, and Germany having a corresponding object, our relations sensibly improved. The idea has hitherto been too Utopian to form the subject of definite proposals, but if this present crisis, so much more acute than any that Europe has gone through for generations, be safely passed, I am hopeful that the relief and reaction which will follow may make possible some more definite *rapprochement* between the Powers than has been possible hitherto.

This was practically a further promise of mediation on the part of Great Britain for the purpose of assuring the permanent peace of Europe.

That these efforts at mediation broke down seems to have been due to the precipitation of Austria-Hungary in declaring war against Serbia and her declining to suspend the outbreak of hostilities. The rest follows as a consequence of this precipitation : Russia's precipitation to mobilise against Austria-Hungary for the protection of Serbia, Germany's precipitate espousal of the quarrel of Austria-Hungary, etc., till the

bulk of the world found itself at war, and only the United States and Spain, among greater Powers, remained free to offer any mediation at all.

The only suggestion of reference of any point to the Hague Court of Arbitration was that in the Serbian reply to the Austro-Hungarian ultimatum, in which the Serbian Government stated that if the Imperial and Royal Government were not satisfied, the Serbian Government, considering that it was not in the common interest to precipitate a solution, were ready, as always, to accept a pacific understanding, either by reference to the International Court at the Hague, or to the Great Powers which took part in the drawing up of the declaration made by the Serbian Government on March 18, 1909.

The history of the Hague Court of Arbitration and the Hague Conventions, like the history of all efforts to eliminate causes of war and diminish its horrors, is a record of discouraging abuse on the part of a class of writers and politicians who condemn all humanitarian progress as mere illusion of dreamers. Yet, there has never been such an argument in their favour as the present insensate war, and if there is a higher authority than the will of man in the shaping of man's destiny, the reaction after the war will assuredly not be in favour of these misguided writers and politicians

who, by exciting nation against nation, sowed the seeds of war, or of the statesmen who, by reviving the monstrous folly of dividing Europe into two huge hostile camps, made the localisation of war of any kind in Europe impossible. History does not always distinguish between right and wrong, and, in general, assumes an indulgent if not admiring attitude towards successful international brigandage. Present generations which have suffered through the incompetency and failure of their governing classes are not likely, however, to allow themselves to be deluded again as to the realities of war compared with those of peace.

T. B.

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NEW METHODS OF ADJUSTING INTERNATIONAL DISPUTES AND THE FUTURE

CHAPTER I

INTERNATIONAL DISPUTES AND PUBLIC OPINION

THE present clash of nations, the greatest the world has ever witnessed, is a vivid illustration of the influence of public opinion. Wars are seldom unpopular. The emotions of expectation and gambling, danger, risk, of courage and fear, of hatred and lust of blood, are all excited and brought into action by a declaration of war. And in the joint work of offence and defence a whole nation can enjoy the thrilling sensation of a vast joint effort. As the war proceeds, these emotions lose their novelty and public opinion its acuity. But just as before an outbreak of war there are latent conditions of public opinion on which statesmen rely, so peace comes when the spirit of the peoples engaged in the war is ready for it, when the atmosphere becomes

charged with peace currents in the place of the currents which had been favourable to war. And, again, just as the causes of war are distinguishable from its occasion, so the causes of the ending of a war are distinguishable from the occasion of its ending. And these causes materialise in both cases in currents of public opinion.

The present is not a suitable moment to dissect public opinion in connection with a war which, owing to the initiation of exceptional ruthlessness against innocent and guilty without distinction, has been and is being waged with unprecedented bitterness. These fateful years, let us hope, will be regarded as a blank in the continuity of civilisation. When the war is over, mankind will no doubt gladly revert to a spirit of law and order, and European State intercourse will probably be resumed under conditions in which the precedents of normal times will have their full force and effect.

Our eyes naturally scan the future with misgivings. The prospect, however, is not at all hopeless or even discouraging. In fact, the present war has so conclusively shown the superiority of methods of peace that we do well, before settling down again to a period of international calm, to take stock of the methods at our disposal for the adjustment of international disputes without re-

course to arms. Public opinion moves slowly, and it is difficult to divert it from any direction in which it is swinging until it has reached the height of its intensity ; it then seems to swing as slowly back. In this play of action and reaction, the reaction will certainly be a revolt against war and entail, so to speak, a stock-taking of what can be done to avoid it in the future.

* * *

Anyone who has closely watched the course of disturbances of international composure during the past fifty years, cannot but be struck by the important part played in final decisions of Governments generally by the public opinion of the nations concerned. And this applies not only to nations managed by their elected representatives, such as Great Britain, France and the United States, which have had a long experience of self-government, but to nations in which government is detached from representation and public opinion has no direct means of exercising pressure in the management of foreign affairs.

This importance of public opinion accounts for Prince Bismarck's precipitate publication of the famous Ems dispatch, for Lord Granville's not publishing the Anglo-French correspondence of 1894 when England bungled and had to beat a retreat too undignified to reveal to the public, for Lord Salisbury's precipitate publication of the

Anglo-French correspondence in the Fashoda affair, for Herr von Kiderlen-Waechter's withholding the terms of his agreement with France till national feeling had cooled down in Germany, and for a host of other incidents in which Governments either wished to excite or to allay public feeling.

* * *

It is not usual to pay much attention to public opinion in Eastern Europe or Asia Minor, and yet more or less recently an attempt to bring about a solution of the Turco-Italian difficulty failed, not because the Turkish Government was undesirous of peace, but because fanatical Moslem feeling in certain parts of Asia Minor had to be humoured. Still more recently a Greek minister, whose popularity and power had been unquestioned for years, had to confess that a certain settlement which seemed reasonable would have to stand over, because a nation flushed with victory cannot be trusted to listen to reason.

* * *

Beyond the national boundaries the expression of public opinion has in some respects the contrary effect. Thus the universal reprobation of the Dreyfus persecution certainly contributed a great deal to the intensity of the anti-Dreyfus spirit in France, and the universal reprobation of the Boer War, I cannot help believing, to

the exaggerated "jingoism" which prevailed in England.

Public opinion outside Russia, though it may have protected Tolstoi from persecution, did anything but attenuate that of the Jews, and its activity outside Turkey seemed rather to provoke than mollify Hamidian fury against the Armenians.

* * *

Public opinion in different countries, again, is neither equally enlightened nor equally intense. Just as in different parts of the same country towns have a more effective influence than thinly peopled areas on the action of Governments, so *ceteris paribus* have thickly than thinly peopled countries.

* * *

Amid possible latent or active unreason, public opinion, with the growth of elective institutions, has to be flattered and only too often to be consoled with promises, according to the degree of its intelligence. Statesmen, to avoid irritating issues, and to preserve at the same time national peace and national dignity, are glad to possess, among their diplomatic machinery, methods by which, when trouble arises, they may either gain time or shift the settlement to another jurisdiction, which will shoulder the responsibility of a solution not in accordance with

the demands or expectations of an easily excited public.

* * *

It has been more especially statesmen of the two great Anglo-Saxon communities which have brought pacific methods, in practice, to their highest point of achievement.

Between the United States of America and England several issues of the first magnitude have been determined by specific reference to joint commissions, that is, commissions composed exclusively of nationals of the two States. It was by such a commission that many of the most delicate questions connected with the North Atlantic fisheries were adjusted.

But they have not confined themselves to the more or less diplomatic jurisdiction of joint commissions. In the Alaska boundary case the joint commissioners sat as independent judges, and to the honour, be it said, of the British sense of justice, the question was solved, without any reference to diplomacy, by one of the British commissioners siding against the contention of his own country.

In another momentous issue, the gravest perhaps which has ever arisen between England and the United States, the Parties went far beyond the utmost limit attained by any other States in their avoidance of war by pacific methods. It

was at a time when the United States army, flushed with victory, might have endangered British dominions in North America. This was the *Alabama* case, which was referred to a Court of Arbitration in which the deciding voice was given to foreign arbitrators.[1]

These two Anglo-Saxon States have been pioneers for the education of public opinion in the advantages of pacific as compared with violent solutions of international differences.

* * *

We must remember also that it is two South American States of kindred origin which are leading the way towards the adoption of pacific methods in the adjustment of difficulties among the Republics of the South American Continent. In another chapter will be found further reference to their efforts to eliminate war from the available methods of recourse whenever they may have the misfortune to quarrel.[2] Nor should we forget that it was a statesman of the Argentine Republic who induced the Second Hague Conference to repudiate armed coercion for the recovery of debts due by States too weak to oppose resistance to a most infamous practice in which England had been a leading sinner.

* * *

As regards the attitude of public opinion to-

[1] *See* p. 40. [2] *See* p. 109.

wards the results of arbitration awards, little or no disposition has been shown to dispute them.

Both the *Alabama* and the Alaskan awards excited British public opinion, which was not prepared for such reverses. Though the former reached the high-water mark of national disfavour, nobody even suggested repudiation. It was felt that national "honour" required that an international award, just because there is no international executive power to enforce it, should be scrupulously respected.

* * *

Turning to another aspect of international matters, it is deeply to be regretted that in several instances in our own time international treaties have not been regarded by public opinion with the same respect as international awards. The attitude of England towards Egypt, of Italy towards Turkey, of Russia towards Persia, of France towards Morocco, and especially of Germany towards Belgium, are all instances of eventual bad faith, however justifiable the original intervention may have been in the one case or unjustifiable in the other. They are additional evidence of the difficulty of preserving the peace of the world even by the most solemn of international undertakings.

* * *

It is seen that in dealing with the subject of

pacific methods of settling international difficulties we must avoid exaggerated confidence in methods of any kind. However ingenious the schemes propounded and however solemnly nations may accept them, there is still a wide margin of danger that they may prove ineffective to prevent popular outbursts of violence and war, so long as the public opinion of different countries has not reached a parallel sense of responsibility in which sudden gusts of intemperance can blow past without deranging the national common sense.

* * *

War is always latent, and nothing, as I have said, is more popular than war while a favourable issue seems probable. Unfortunately, there are few international difficulties which cannot be fanned into dangerous questions, whether a vital interest is really involved or not. How to deal with such matters, when diplomacy has failed, is a problem which has puzzled peacemakers for the last four centuries. It has exercised and still exercises the imagination of the greatest European statesmen and thinkers. In the following chapters I shall deal with the latest aspects of the problem and its solution as they present themselves in contemporary politics.

CHAPTER II

INTERNATIONAL DIFFERENCES AND THEIR VARIETIES

BEFORE discussing the methods by which international differences are susceptible of being settled without recourse to war, it is desirable to have a clear idea of the different matters which give rise to differences.

International differences, fortunately, are not all equally difficult of solution.

They are of many kinds. Some are vague and political. Others are of a more precise and determinable character.

* * *

To begin with the latter, there are disputes between individual citizens belonging to different States which do not affect their Governments at all, such as questions of contract and tort, marriage, divorce, agency, insurance, etc., matters belonging to the private civil law of nations and over which the ordinary Law Courts, by the courtesy of civilised nations, have exclusive jurisdiction.

Then there are mixed cases between citizens

of one country and the Government of another, such as where a citizen of one State or his property has suffered through misfeasance or an abnormal absence of the ordinary safeguards of order on the part of a foreign authority, and which it would be contrary to common sense to leave to the decision of the offending State. There are also mixed cases where, owing to the doctrine of exterritoriality, the offender must be followed to the offending State, again party and judge in its own cause. This happens, for instance, in cases of collision between a warship of one country and a private ship of another, or in matters in which a private person has suffered some wrong at the hands of a diplomatic agent covered by diplomatic immunity. Such matters are by their nature international and belong to the scope of arbitration, unless the foreign plaintiff accepts the jurisdiction of the offending party. These cases of a mixed public and private character present considerable difficulty, to which I shall revert in a later chapter.

There are other cases which, though they affect individual citizens, are purely international, such as where fugitives from the criminal law are concerned. These matters are regulated by treaties of extradition and are dealt with between the State Departments concerned.

Lastly, there are matters which do not concern

individual citizens, but are of a character affecting citizens generally. Of these, there is a vast variety embracing, at the present day, almost as many subjects as there are national activities. I will cite a dozen of them, already regulated by international conventions, to show how immense is their variety :

1. Sanitary matters affecting persons, cattle, luggage ;
2. Repatriation of indigent aliens ;
3. Postal, telegraphic and telephone services ;
4. Submarine cables ;
5. Port regulations ;
6. Fishery matters ;
7. Trade marks, patents, etc. ;
8. Copyright ;
9. Commercial companies ;
10. Treatment of commercial travellers ;
11. Customs regulations ;
12. Transit arrangements for goods traffic ; etc.

The incidents to which such matters give rise are seldom difficult to settle through the diplomatic channel. They belong to the daily life of chancelleries and corresponding Foreign Office Departments, and, when differences of view or opinion occur between individuals and the Governments concerned, they seldom reach the attention of any body of public opinion beyond that represented by Chambers of Commerce and Trade Boards, which are as cold-blooded as Government Departments themselves.

* * *

We come now to the more serious matters of a less precise character, where Governments move on thin ice and the greatest care and skill are requisite to avoid accidents. In a composite State like the British Empire, with colonies and dependencies in all parts of the world which are in immediate conterminous contact with other States, it is not easy to isolate any issue or deal with any difficulty without considering in conjunction with it a number of accessory questions which may not be of immediate relevancy.

The official tradition of England is to follow British interests for their protection, and not to act as a pioneer for trades which can much better do their pioneer work themselves.

British enterprise has penetrated into almost every place where British goods can be sold. The British flag has followed that enterprise. To prevent other States from closing markets against it, England has been led into annexing more territory than the growth of her population requires, but she has followed the wise policy of not differentiating against other countries in favour of her own, and the citizens of the majority of other States, therefore, prefer that she should be the State in possession rather than any other State.

To preserve her dominion over colonies and dependencies, to keep open all the existing routes

and channels of communication among the different parts of her vast Empire, to withstand aggressive rivals, to maintain order among unruly neighbours and at the same time friendly relations with those whose projects the prosecution of these purposes may disturb, are among the problems of England's foreign policy, and they are of the most delicate character.

In such matters as these the incidents which occur are generally known to the public as soon as to the Government Department concerned. This was the case with the Fashoda incident, which brought this country within an inch of war with France. It was the case with the French action in Morocco, which, a few years ago, very nearly precipitated war between France and Germany and later between England and Germany. These matters which affect whole areas of the habitable world—a limited quantity—strike the public imagination, and Governments are always liable to be carried off their feet in a wave of popular feeling if it gets out of hand.

* * *

There is still one other kind of international difficulty. It is where an unskilful diplomacy has allowed some matter, in itself of no great importance, to attain national significance. An insult to the flag or a want of courtesy to a diplomatic or even consular agent may let loose

an avalanche of recrimination, while immediate and adroit manœuvring may turn it even to good account. In such matters red-tapism is fatal, for they are among the matters supposed to involve "national honour," and in such matters promptitude is essential.

CHAPTER III

DIPLOMACY, GOOD OFFICES AND MEDIATION

In the preceding chapter an attempt has been made to give some idea of the matters which arise between States and their relative gravity. With the bulk of them, diplomacy is generally able, without difficulty, to deal more or less satisfactorily, though perhaps often less satisfactorily than would please those who are affected by the arrangements concluded.

* * *

For the purpose of dealing with these matters which constitute the international activity of States, Governments are provided with ministries of foreign affairs and a diplomatic service, both of which are carefully trained in methods of negotiation, and selected as much as possible from a class of society to which the practice of courtesy comes easily. The manner of discussing delicate or irritating issues obviously must play a very important part, especially where, as frequently happens, there is a mistake to retrieve without sacrifice of national dignity.

The Foreign Minister or Secretary of State is assisted in his work by a large staff of officials. In England, the staff is divided up among eleven Departments, viz.:

Departments.	Distribution of Business.
1. African Protectorates	East Africa, Uganda, British Central Africa, Somaliland.
2. African . . .	South-east, West and South-west Africa.
3. American . .	North, Central and South America, and Pacific Islands.
4. Commercial and Sanitary	Correspondence with His Majesty's Ministers and Consuls abroad, with the Representatives of Foreign Powers in England, the Board of Trade and other Departments of His Majesty's Government, as well as with Commercial Associations, etc., on matters strictly commercial, Sanitary Questions, Copyright, Protection of Industrial Property.
5. Consular. . .	Correspondence with His Majesty's Ministers and Consuls abroad, and management of all matters relating to the Consular Service.
6. Eastern (Europe) .	Greece, Montenegro, Roumania, Servia, Russia, Turkey, Persia and Egypt, Abyssinia and Somaliland, Central Asia.
7. Far Eastern . .	China, Japan, Siam and Corea.
8. Western (Europe) .	Austria, Bavaria, France, Germany, Italy, Portugal, Spain, Switzerland, Belgium, Denmark, Netherlands, Sweden, Nor-

	way, Morocco, Newfoundland Fisheries, Borneo and Eastern Archipelago.
9. Financial . .	Estimates, Examination and Control of Accounts, Diplomatic Appointments, Messengers, Cabinet Keys, Issue of Salaries, Diplomatic Pensions, Establishment Questions.
10. Librarian and Keeper of the Papers	Custody, Arrangement and Registry of the MS. Correspondence, Confidential Papers, Treaties and Printed Library, Preparation of Memoranda on Historical Events, International Cases, Treaty Questions, etc., Correspondence on matters relating to the Public Record Office, etc.
11. Treaties, etc. . .	Treaties, Orders in Council, Full Powers, Commissions, Credentials, Exequatur, Royal Letters, British and Foreign Orders, Medals and Rewards, Diplomatic Privileges, Questions of Ceremonial, Precedence, Nationality and Naturalisation, Protection, Extradition, Enforcement of Foreign Enlistment Act, Consular Conventions, Passports.

These Departments are managed by some 35 to 40 specially trained public servants under 1 chief permanent under-secretary and 3 or more permanent assistant under-secretaries.

The diplomatic service, under the direction of the Foreign Secretary, is divided up among some

130 men, of whom 8 are ambassadors, 16 envoys extraordinary and ministers plenipotentiary, 2 ministers plenipotentiary and 10 ministers resident.

Alongside the diplomatic service there is a widespread consular service which, apart from 7 agents and consuls-general, who have a more or less diplomatic character, consists of 55 consuls-general, 124 salaried consuls, 49 unsalaried consuls, 104 salaried vice-consuls, 451 unsalaried vice-consuls, 52 consular agents and 126 pro-consuls, all of whom have duties to perform in which tact, knowledge and natural vigilance are required.

The official staff engaged in the conduct of British foreign relations, it is seen, is considerable, and their utility is in proportion to their ability and zeal. We have, however, to deal here with diplomacy alone, and diplomacy includes only the Foreign Office Departments and the diplomatic service.

* * *

Business between States is conducted by means of intercourse between the diplomatic representatives and the Foreign Office of the country to which they are accredited. Though it is only exceptionally that Foreign Secretaries meet each other in the flesh for business purposes, such meetings have become of late years frequent. Notable cases of this were when

M. Delcassé in 1903 accompanied M. Loubet to London, and there drew up in direct conjunction with Lord Lansdowne the heads of an Anglo-French settlement, and when, more recently, M. Sasonow came to England to discuss certain matters of possible joint action with Sir Edward Grey. On the Continent, such direct contact has become of much more frequent occurrence than on the part of British Foreign Secretaries. Visits between the Foreign Ministers of France and Russia, and between those of Germany, Austria and Italy, in fact, became so frequent during the last few years prior to the war that they had almost ceased to excite public curiosity.

* * *

In diplomatic intercourse the greatest precautions are necessary to avoid misunderstanding, especially in view of the fact that allied Powers are supposed to keep one another scrupulously posted up in all matters which may involve either of them in international complications.

Sir Edward Malet, in an essay published in 1899,[1] gave advice to diplomatists which shows how, at any rate, some sources of misunderstanding can be avoided. The passage is as follows :

> Cultivate the art of reproducing in writing the true tenor of conversation—the exact words if possible. In reproducing

[1] *Unwritten Laws and Ideals.* Edited by E. H. Pitcairn. London: Smith, Elder, & Co. 1899.

the words of your interlocutor, try to convey precisely not only what he said, but also what he wanted to say. Herein lies a difference. It occasionally happens that the Minister of Foreign Affairs, to whom we will suppose you to be speaking, lets fall an unguarded expression. Never take advantage of it. It is useless to repeat words of his which he did not intend to utter. By reporting such words you lose his confidence and mislead your own Government.

When a very serious matter is treated of in conversation, it is advisable to show the report of the conversation to the Minister and ask him if it is correct. Never mind if he denies his own words or wishes to add words which he never spoke. The point is, to lay his views before your Government; and this is the only way in which you can be quite certain of doing it.

Would that such salutary counsel had been followed in more than one instance within the last ten years! Would also that Ministers of State were more prudent in their statements! Misunderstandings occur, suspicions are awakened by incautious statements, though very often only too well justified, conflicts of interest arise, neither Party is strong enough to yield, the vital importance of certain matters to one nation is not appreciated by another, a Foreign Minister or high official may bid for popularity or advancement by some high-handed proceeding, and suddenly nations find themselves in the throes of an international crisis which may become unmanageable before diplomacy has exhausted its methods. Lord Dufferin once said to the present writer that he was convinced that whenever such

international trouble arose "unintentionally," it was due to some weakness of diplomatic management, and that with tact and goodwill on either side it was always possible to settle the gravest differences by a cheaper and more satisfactory method than by even covert threats.

* * *

That trouble occurs in spite of the care taken in all countries to recruit the heads of missions from the most capable of the trained men available, brings us to another aspect of the subject.

War is like a street fire. No one can foresee which way the wind may blow the flames or where burning fragments may alight, and, as we see in the present war, war is a danger for the neighbouring or neutral Powers, not compensated by any adequate resulting advantage to them. When a fire breaks out, the first impulse of outsiders is to try to stop or isolate it. Following this analogy, neighbours would immediately in their interest endeavour to bring the angry parties to amicable negotiation. Such an impulse, strange to say, is seldom followed.

Thus the good offices and mediation of third parties, which have been provided for in more than one international Treaty, and have been more or less minutely dealt with in one of the

Hague Conventions, have never been seriously employed.

* * *

As good offices are often confused with mediation, I may explain that good offices are something short of a tender of mediation. On acceptance by both parties, they become mediation. Until accepted, they have only a semi-official character. This was the case in the Venezuela-Guiana boundary question. The United States suggestion of mediation to the British Government "to promote an amicable settlement of the respective claims of Great Britain and Venezuela" [1] was declined, and yet the "good offices" of the United States resulted in a Treaty [2] between Great Britain and Venezuela to submit the question to arbitration.

Mediation may be defined as a deliberate effort made by a neutral and friendly State to restore or to preserve peace between two States at war or on the eve of war with each other. From intervention it differs in being a friendly and gratuitous proceeding, which intervention obviously is not. Intervention, in fact, is the deliberate interference of a State in the affairs of another State or as between other States for the purpose of maintaining or of altering the con-

[1] Mr. Phelps to Lord Salisbury, February 8, 1887.
[2] Washington, February 2, 1897.

dition of things within it, and it is an act of hostility, though its object is generally to ensure the preservation of peace.

* * *

Among the several efforts made to introduce mediation into the practice of States was Article 8 in the Treaty of Paris of March 30, 1856, concluded at the close of the Crimean War, which provided that :

> If any dissension shall arise between the Sublime Porte and one or more of the other Signatory Powers threatening the maintenance of their good relations, the Sublime Porte and each of these Powers, before resorting to force, shall give an opportunity to the other Contracting Parties to mediate between them in order to prevent such extreme measures.

Again in the Convention of Berlin of February 26, 1885 (Article 12), dealing with Central Africa, it was similarly provided that :

> In the case of any serious dissension having arisen on the subject of or within the territories mentioned in Article 11,[1] and placed under the régime of commercial liberty, between any Signatory Powers to the present Act or the Signatory Powers which may afterwards become Parties thereto, these Powers bind themselves before taking up arms to have recourse to the mediation of one or more of the friendly Powers.

Cases also exist in which Contracting States have agreed to place themselves under the permanent mediation of some friendly Power. Such a case was that of the Treaty of Yeddo between

[1] Article 11 set out the territorial boundaries of the area in question.

the United States and Japan of July 29, 1858, Article 11 of which provided that :

> The President of the United States, at the request of the Japanese Government, will act as a friendly mediator in such matters of difference as may arise between the Government of Japan and any European Powers.

Somewhat analogous but farther-reaching was a clause of the Chile-Argentine Treaty of May 28, 1902, in which the Contracting Parties submitted all conflicts which might arise between them to the arbitration of the reigning British Sovereign.

Of all such clauses, it may be said that the intention is excellent.

A comparatively recent instance of successful mediation, on the other hand, was that of Pope Leo XIII. in the dispute which arose between Germany and Spain in 1885 relative to the hoisting of the German flag on one of the Caroline Islands. Germany had consented to arbitration, but owing to the refusal of Spain to arbitrate on a question affecting her indisputable territorial rights, Germany proposed the mediation of the Pope. Spain accepted, and the Pope drew up proposals accepted by the two States, which became the basis of a protocol of arrangement between the Parties signed at Rome on December 17, 1885.

* * *

At length, at the first Hague Conference in 1899, an attempt was made to regulate good

offices and mediation as a recognised branch of diplomacy.[1]

The main points in the regulation were that, in case of serious disagreement or conflict, before making an appeal to arms, the Contracting Powers agreed that they would have recourse, as far as circumstances might allow, to the good offices or mediation of one or more friendly Powers; that, independently of this recourse, they considered it expedient and desirable that one or more Powers, strangers to the dispute, should on their own initiative, and, as far as circumstances might allow, offer their good offices or mediation to the States at variance; that Powers, strangers to the dispute, had the right to offer good offices or mediation even during the course of hostilities; and that the exercise of this right could never be regarded by one or the other of the Parties in conflict as an unfriendly act.

These Articles have proved in practice, during the fourteen years they have been in force, as futile as previous efforts.

* * *

The chief difficulty in the way of applying any system of mediation is that, when negotiations have reached a critical point and national feelings are roused, the Powers in question necessarily

[1] The Articles on the subject, which were verbally modified at the Conference of 1907, will be found in the Appendix. *See* p. 136 *et seq.*

avoid any act which might be taken as a sign of weakness, and, while war is raging, the only Party which is likely to accept mediation is the losing one.

In the course of the Russo-Japanese War a suggestion to offer mediation was made to Lord Lansdowne by the Committee of the International Arbitration and Peace Association in London. The Committee suggested that " the time had come when His Majesty's Ministers might, in concert with other Powers, appeal to the Governments of Russia and Japan to suspend the course of the war, if only for a temporary cessation of hostilities, so that measures could be taken towards arriving at some definite settlement of the territorial and political contentions of the two Powers with due regard to the interests of other nations." Lord Lansdowne replied that neither of the belligerents having expressed any desire for mediation, His Majesty's Government did not consider that they could with advantage take such an action as that suggested by the Committee. Possibly, of course, either one or both of the Parties in the war may have been unsuccessfully sounded on the subject. Till the final naval battle was fought, however, the ultimate issue of the war was still problematic. President Roosevelt immediately after that battle offered his good offices to the victorious Japanese, who could then accept them without loss of pres-

tige, and mediation resulted which brought the war to an end.

* * *

Such mediation as the above is outside the rules laid down by the Hague Conference, the object of which was to find some method by which difficulties could be amicably discussed and solved before hostilities began, or, in the course of hostilities, without waiting till after they had been practically solved by war. Owing to the existence of a permanent and official peace organisation at the Hague, it now seems possible to give mediation in connection with this organisation a place among the standing methods of diplomacy which would largely remove the difficulties of its application. The fact that in both the Turco-Italian and Balkan Wars the Parties communicated to the public, through the Press, detailed semi-official statements of their grievances, thus attempting to conciliate the public opinion of Europe, showed that the Powers in question were not indifferent to it.[1] If, as these facts seem to show, statesmen now see the importance of conciliating public opinion, then the public refusal of mediation might at any rate deter the commission of acts of supreme and manifest injustice. For such a purpose the International

[1] Even in the present war most of the Governments involved have endeavoured, by publishing statements and correspondence, to justify their attitudes before its outbreak.

Bureau at the Hague might be the medium of publicity, the proposal of mediation might become automatic, and the Parties to the war might be placed on the defensive in stating, or declining to state in case of refusal, why they refused.

* * *

With a view to making this suggestion perfectly clear, I have drawn up the following scheme of Articles, embodying what seems feasible in existing circumstances :

1. In case of any disagreement between any of the Contracting States, which may have caused a rupture of diplomatic relations, the International Bureau shall at once call the attention of the said States to their having agreed to the following provisions :

2. The said States undertake forthwith to communicate an *exposé* of their respective grievances to the International Bureau of the Hague Court. The International Bureau shall, upon communication of such *exposé* by either or both Parties, immediately have it or these printed, and shall communicate with the least possible delay copies thereof to the diplomatic representatives at the Hague of the other Contracting Powers. The Bureau shall also call a meeting of the said diplomatic representatives, to be held at any time not exceeding ten days after communication of the said *exposé* or *exposés*, for the purpose of receiving any further communication in connection therewith, and ascertaining if any Power or Powers is or are prepared to offer its or their good offices for the purpose of mediation.

3. Any State shall have the right at any moment to lay an *exposé* of any difficulty which it may have been unable to settle by diplomatic negotiation before the International Bureau at the Hague, which, thereupon, shall print the said *exposé* and submit it to the diplomatic representatives at the

Hague, and call a meeting of the said representatives, to be held at any time not exceeding twenty-one days thereafter, for the purpose of receiving any communication in connection therewith, and ascertaining if any Power or Powers is or are prepared to offer its or their good offices for the purpose of mediation.

4. If any State laying such an *exposé* before the Bureau shall not be a Contracting Power or have no diplomatic representative at the Hague, it shall be entitled to request the diplomatic representative of any Contracting Power to represent it *ad hoc*, and, if any such Power shall decline so to act, the International Bureau may *ex officio* appoint any person to act as representative for the purpose of communication with the State in question.

These Articles being based on existing institutions and practice require no further substructure.

* * *

There is a form of mediation which lies beyond the scope of Treaties, and which in some cases, behind the scenes, has been successful in procuring the satisfactory settlement of international differences, viz., the private mediation of a common friend of the Ministers in charge of the difference in his private capacity. This is perhaps the most effective of all methods, when extremities are still sufficiently remote for reasonable suggestions to be adopted, but it has the inconvenience of exciting official jealousy, which adds a complication to the difficulties to be overcome.

* * *

As regards mediation in connection with the present war, in the fateful days which preceded

the outbreak of hostilities, no conciliatory efforts by independent States which might have led to peace were made by any neutral Power. No British interest, it is true, was involved in the ultimatum to Servia, and she was not pledged by Treaty to espouse the quarrel of any other Power. Sir Edward Grey, on behalf of England, did propose the mediation of England, France, Italy and Germany. France and Italy agreed. Germany, who had accepted mediation in principle, professed to be herself mediating between Russia and Austria. Austria-Hungary even accepted a basis of mediation. Yet all efforts failed. They failed, in my opinion, as much from want of a totally independent mediating Power as from the absence of any sincere desire, on the part of, at any rate, one Power concerned, to preserve peace. In short, the present war is not an appropriate example of the working or failure of mediation, and no conclusions can be drawn from it either for or against the principles laid down at the Hague Conference.

CHAPTER IV

PEACE IDEALS IN THEORY AND PRACTICE

Good offices or mediation may lead to a complete settlement, or they may lead to one in which arbitration may be accepted either on the whole question or on fixed points of detail, or they may be declined or fail. If they only result in delaying the commencement of hostilities, time may be gained. Both Parties may have time to consider consequences. Then direct negotiation may succeed where mediation has failed. The Hague Peace Convention, it has been seen, secures for the Parties to it "the right" to tender good offices or mediation before the commencement of hostilities, or after they have begun, or at any time during their continuance. The time may come when the abnormal conditions which led to the present war have been succeeded by others in which nations do not bind themselves to espouse each other's quarrels, when the exercise of this right may have the character of an injunction. Meanwhile, good offices and mediation are mere adjuncts of diplomacy, mere methods of pro-

longing or renewing negotiations directly or indirectly. They may avert a war or bring it to a conclusion, but they are not yet an organic institution which can displace war.

* * *

The idea of substituting peaceful methods for the employment of brute force is of comparatively recent origin, and is distinct from the older one of drawing nations together by federation in a common interest, with which it is sometimes confused.

Institutions, plans and combinations of the latter kind have frequently arisen in the course of history.

Such a one, to begin with a pre-Christian era, was the Amphictyonic Council, which grew out of the common worship of the Hellenes. It was not so much a political as a religious body. "If it had any claim," says Freeman,[1]

> to the title of a General Council of Greece, it was wholly in the sense in which we speak of general councils in modern Europe. The Amphictyonic Council represented Greece as an Ecclesiastical Synod represented western Christendom. Its primary business was to regulate the concerns of the Temple of Apollo at Delphi. The Amphictyonic Council which met at Delphi was only the most famous of several bodies of the same kind.
>
> It is easy, however, adds Freeman, to understand how the religious functions of such a body might assume a political

[1] *History of Federal Government in Greece and Italy*, 2nd edition, London, 1893, p. 97.

character. Thus the old Amphictyonic oath forbade certain extreme measures of hostility against any city sharing in the common Amphictyonic worship, and it was forbidden to raze any Amphictyonic city or to cut off its water. As the only deliberative body in which most Greek communities were represented, its decisions were those of the bulk of the Hellenic people. It sank eventually into a mere political tool in the hands first of Thebes, then, under Philip, of Macedonia.

The so-called *pax romana* was merely peace within an Empire governed by a central authority, the constituent parts of which were held together by a network of centralised administration.

The Feudal System was a system of offence and defence, and its object was organisation for war, not the organised regulation of peace. Yet, it had elements of federation and peace within the bonds of its hierarchy.

The spiritual influence of the Church, again, was exerted to preserve relative peace among feudal princes. The "Truce of God" was established by the clergy (originally in Guyenne in 1031) to take advantage of the holy days and festivals for the restriction of the time available for bloodshed.

The "Grand Design" of Henry IV. (France), which some historians regard merely as the fantastic idea of a visionary, was probably a scheme of his great Minister Sully to avert by a federation the conflict which he probably foresaw would break out sooner or later between Catholic and

Protestant Europe, and which in fact broke out some fifteen years later in the Thirty Years' War.

The Holy Roman Empire itself was in some respects an agent for the preservation of peace among its constituent States. In the same way the Federation of the Swiss Cantons, of the States of the North American Union and of the present German Empire have served as a means of reducing the number of possible parties to war and consequently of its possible occasions.

In our own time, the Holy Alliance was an arrangement entered into, in 1815, by the Emperor Alexander I. of Russia (who inspired and proposed it), the Emperor of Austria and the King of Prussia, by which they solemnly proclaimed their "fixed resolution," both in the administration of their respective States and in their political relations with every other Government, to take for their sole guidance "the precepts of that Holy Religion, namely, the precepts of justice, Christian charity and peace, which, far from being applicable only to private concerns, must have an immediate influence on the counsels of Princes, and guide all their steps, as being the only means of consolidating human institutions and remedying their imperfections." The idea of the Czar seems to have been to create a general confederation for the maintenance of peace. Its

moral influence continued till it was overshadowed by a new democratic spirit based on the brotherhood of mankind and national emancipation, amid which existing autocracies had to remedy their own imperfections.

* * *

The Balance of Power, which has played in the history of modern Europe such an important part, is based on the notion of the independence and stability of States. Just, as in Italy, the common weal of the different republics, which crowded the limited area of the peninsula, required that no one of them became so powerful as to be a danger to the independence of the others, Western Europe had a similar danger to counteract. France, Spain and the Empire were competing with each other in the acquisition of power detrimental to smaller States. Great Britain and the Netherlands, Prussia and Russia, had interests in the preservation of any *status quo* which was threatened, and wars were waged and Treaties concluded to maintain or adjust the strength of States and prevent any one of them from obtaining undue predominance.

The break-up of what remained of Feudal Europe and its readjustment under Napoleon left the Western world with five fairly balanced homogeneous nations. These took the place of the old heterogeneous areas governed

by their respective sovereigns and now assumed the hegemony of the West.

* * *

In more recent times, and especially after the Treaty of Paris of 1856, this combination became known as the "Concert of Europe." This Concert of Europe, as the name implies, in contradistinction to the theory of the Balance of Power, was essentially a factor for the preservation of peace.

In connection with the Concert of Europe, humanitarians were entitled to cherish the hope that it might develop into a European Council of greater States, capable of insisting upon the preservation of law and order among less orderly communities. Unfortunately for any such hope, diplomacy lost consciousness of its own destiny, and Europe drifted back from its higher ideals to the old "Balance of Power," in which three Great Powers on the one side were in perpetual rivalry with three other Great Powers.

The immediate consequence of the break-up of the Concert was three disastrous wars, an expansion of armaments which was almost as disastrous as war itself, and the present crisis in the destinies of Europe, the end of which is not yet within the scope of human conjecture.

Yet the wish to bring about in Europe the rule of justice, Christian charity and peace had never

been so keen as during a few years before the outbreak of the present war.

* * *

In his famous rescript of August 24, 1898, the ex-Czar stated that he thought the moment "very favourable for seeking, by means of international discussion, the most effectual means of assuring to all peoples the benefits of a real and durable peace." In the course of the last twenty years, added the rescript, the preservation of peace had become an object of international policy. Economic crises, due in great part to the existing system of excessive armaments, were transforming armed peace into a crushing burden, which peoples had more and more difficulty in bearing. He, therefore, proposed that there should be an International Conference for the purpose of focusing the efforts of all States which were "sincerely seeking to make the great idea of universal peace triumph over the elements of trouble and discord." The first Conference was held in 1899 and another followed in 1907. At the earlier one twenty-six Powers were represented, at that of 1907 forty-four—practically the whole civilised world.

At neither Conference did the Great Powers agree to anything in the sense of the Czar's main purpose beyond the vague expression of a desire that "something should be done." But other

work was effected which concerns the subject of this book more particularly. Not only were the rules respecting good offices and mediation, dealt with in the last chapter, adopted, but a detailed Code of International Arbitration was drawn up and agreed to and an International Court of Arbitration established. At the second Conference both were the subject of further consolidation, a procedure for Commissions of Inquiry was instituted, and the *ensemble*, forming a new institution in the world's economy, possessing, thanks to the generosity of Mr. Andrew Carnegie, its own palace of justice and its own independent staff, is now on the way to having its own independent judges.

CHAPTER V

NATURE, PROGRESS AND SCOPE OF ARBITRATION

We are not concerned in this volume with the occasional history of arbitration, but with its organisation as a judicial system and an international institution. This view of the subject does not take us back beyond the famous *Alabama* case.

* * *

The *Alabama* was a British-built vessel which, in spite of knowledge of her destination for service as a cruiser on the Confederate side in the American Civil War, was allowed by the British authorities to leave British waters (July 1862). At the conclusion of the war, the United States claimed damages from Great Britain for the havoc wrought by the *Alabama* among the American shipping, and diplomatic negotiations on the subject led to an Anglo-American agreement for submission to arbitration of this and other matters, in which Great Britain was charged with inadequate observance of her neutral duties.

Under the agreement certain rules were laid

down by the Parties for the determination of neutral duty in the cases submitted, with the proviso that they should not be regarded as a declaration of international law. Since then, however, they have come to be regarded as a fair statement of neutral duty, and have now been incorporated in the Hague Conventions of 1907 as the accepted law of neutrality. This was the first instance of a determination beforehand of the judicial principles on which the decisions of the arbitrators were to be based.

It was also the first instance of arbitrators sitting as Court of Law. There were five judges —Sir Alexander Cockburn, Lord Chief Justice of England, on behalf of Great Britain, Mr. Charles Francis Adams, on behalf of the United States, and three independent judges belonging to Italy, Switzerland and Brazil respectively. Among them it is seen the Parties were directly represented. This became a precedent for the constitution of arbitration Tribunals thereafter. The Court sat in the neutral city of Geneva. The method followed was, as nearly as possible, that of a Court of Justice. The award given in December 1871, shortly after the conclusion of the Franco-German War, though Lord Chief Justice Cockburn dissented, was carried out by the payment to the United States Government of a sum of £3,230,000, representing the assessed damages

and cost of the award. Some indignation in ultra-patriotic quarters resulted, but now, after nearly half a century, it would be difficult for anyone to show that the alternative of a war with the United States would have been of greater advantage or less costly or more to the honour of England.

* * *

The example of the *Alabama* trial was not, however, followed till twenty years later, when the Behring Sea Seal Fisheries case threatened Anglo-American equanimity. This time the Court was composed of two judges on behalf of each of the Parties and three foreigners, chosen respectively from France, Italy and Sweden and Norway.[1] As before, the forms and procedure of a Court of Justice were put in practice.

Four years later (1897) the Venezuela boundary question was settled in the same legal forms by a Court of Arbitration, which again sat in Paris. As in the Behring Sea case, the Parties were each represented by two judges—Lord Russell of Killowen and Lord Justice Henn Collins on behalf of Great Britain, and Chief Justice Fuller and Mr. Justice Brewer of the United States Supreme

[1] It sat in Paris. The judges were Lord Hannen and Sir John Thompson on the British side, Judge John Harlan and Senator J. T. Morgan on the American side, and the Marquis de Visconti-Venosta (Italy), M. Gregers Gram (Sweden and Norway), and Baron de Courcel (France), who presided. It gave its award in August 1893.

Court on behalf of Venezuela; but this time a single foreign judge was appointed, viz., Professor F. de Martens of Petrograd, chosen, under the protocol of reference, by agreement among the other arbitrators.

* * *

The reference of minor international differences to arbitration had always been more or less frequent. In the course of the last century over a hundred matters had thus been adjusted.

International jurists, however, were generally agreed that arbitration was not adapted to a certain class of conflicts.

M. Rouard de Card in 1892 confined arbitrable cases to matters of boundary, the possession of territory, the seizure of vessels or confiscation of cargoes, violent or arbitrary acts against foreigners, rights of navigation and fishery and to the assessment of damages.[1]

Sir R. Webster (Lord Alverstone), in a speech delivered before the International Law Association in 1895, cited as typical cases susceptible of arbitration:

1. Cases of boundary;
2. Cases of damage for an admitted wrongful act;
3. Cases of dispute involving questions of local right.

Professor Lorimer of Edinburgh asked, with reference to the prevalent limitations to arbitra-

[1] *Destinées de l'arbitrage international*, Paris, 1892, p. 208.

tion, "whether the class of cases which remain to it be not precisely those which have hitherto been disposed of perhaps just as surely and more quietly by diplomacy?" "The percentage of international differences which led to war," observes that author, "was always limited; and if this percentage cannot be limited still further by referring some of them to arbitration, then arbitration becomes merely a method by which diplomatists may ascertain facts, assess damages and the like." [1]

If, however, diplomacy could so easily have disposed of the matters which have been submitted to arbitration, is it not probable they would have been thus disposed of? Be that as it may, jurists, statesmen and other practical men had begun, towards the close of the nineteenth century, seriously to think about the possible widening of the scope of arbitration, of the possibility of making standing or general Treaties of Arbitration, even of creating a permanent Court of Arbitration, without the ironical undercurrent which had previously marked the expression of their feeling towards a method of settling international difficulties which had been made somewhat ridiculous by the exaggerated hopes of some of the more injudicious advocates of arbitration.

* * *

[1] *Law of Nations*, 1883–84, p. 212.

It was in these circumstances, therefore, only a partial surprise to Englishmen when they heard in 1896 that so positive and unemotional a statesman as the late Lord Salisbury was actually in person directing negotiations with the United States Government for the conclusion of a standing Treaty of Arbitration between the two Anglo-Saxon peoples.

The negotiations resulted in the signature on January 11, 1897, by Lord (then Sir Julian) Pauncefote, British Ambassador to Washington, and Mr. Olney on behalf of the United States Government, of a general Treaty of Arbitration to last for five years.[1]

[1] Lord Salisbury's proposals had not gone so far as this. Still, the heads of a Treaty of Arbitration in certain cases drawn up by him in conjunction with Lord Alverstone, then Attorney-General, and enclosed in a communication to Sir Julian Pauncefote, dated March 5, 1896, are such a remarkable advance in the official attitude then observed throughout Europe towards arbitration that the document may be regarded as a historic turning-point in connection with the subject. It was as follows:

"1. Her Britannic Majesty and the President of the United States shall each appoint two or more permanent judicial officers for the purposes of this Treaty; and on the appearance of any difference between the two Powers, which, in the judgment of either of them, cannot be settled by negotiations, each of them shall designate one of the said officers as arbitrator; and the two arbitrators shall hear and determine any matter referred to them in accordance with this Treaty.

"2. Before entering on such arbitration, the arbitrators shall select an umpire, by whom any question upon which they disagree, whether interlocutory or final, shall be decided. The decision of such an umpire upon any interlocutory questions shall be binding upon the arbitrators. The determination of the arbitrators, or, if they disagree, the decision of the umpire, shall be the award upon the matters referred.

"3. Complaints made by the nationals of one Power against the

The Parties were to bind themselves to submit for decision under it all questions in difference between them which diplomacy had failed to settle.

There were to be three classes of arbitration Tribunals. For questions of indemnity up to £100,000, three arbitrators were to be necessary. When more than that sum was in dispute, five

officer of the other ; all pecuniary claims or groups of claims amounting to not more than £100,000 made on either Power by the nationals of the other, whether based on an alleged right by Treaty or agreement or otherwise ; all claims for damages or indemnity under the said amount, all questions affecting diplomatic or consular privileges ; all alleged rights of fishery, access, navigation or commercial privilege, and all questions referred by special agreement between the two Parties, shall be referred to arbitration in accordance with this Treaty, and the award thereon shall be final.

"4. Any difference with respect to a question of fact, or of international law, involving the territory, territorial rights, sovereignty or jurisdiction of either Power, or any pecuniary claim or group of claims of any kind, involving a sum larger than £100,000, shall be referred to arbitration under this Treaty. But in any such case, within three months after the award has been reported, if either Power protests that such award is erroneous in respect to some issue of fact, or some issue of international law, the award shall be reviewed by a Court composed of three of the judges of the Supreme Court of Great Britain and three of the judges of the Supreme Court of the United States ; and if the said Court shall determine, after hearing the case, by a majority of not less than five to one, that the said issue has been rightly determined, the award shall stand and be final ; but, in default of such determination, it shall not be valid. If no protest is entered by either Power against the award within the time limit it shall be final.

"5. Any difference which, in the judgment of either Power, materially affects its honour or the integrity of its territory, shall not be referred to arbitration under this Treaty except by special agreement.

"6. Any difference whatever by agreement between the Powers may be referred for decision by arbitration, as herein provided, with stipulation that, unless accepted by both Powers, the decision shall not be valid.

"7. The time and place of their meeting and all arrangements for the hearing and all questions of procedure shall be decided by the arbitrators or by the umpire if need be."

arbitrators were to be called in. Cases involving the "determination of territorial claims" or of "questions of principle of grave general importance affecting the national rights" of either State were to be submitted to a Tribunal composed of six members, three of whom to be judges of the British Supreme Court of Judicature, or members of the Judicial Committee of the Privy Council, and the other three to be judges of the Supreme Court of the United States, or justices of the Circuit Courts. Their award by a majority of not less than five to one was to be final. In case of an award made by less than the prescribed majority, the award was to become final, unless either Power should, within three months after the award had been reported, protest that the same was erroneous, in which case it was to be of no effect. Nevertheless, in case of an award made by less than the prescribed majority and protested as thus provided, or in case the members of the Arbitral Tribunal should be equally divided, there was to be no recourse to hostile measures of any description until the mediation of one or more friendly Powers had been invited by one or both of the High Contracting Parties.

* * *

The essential point in the Treaty was that for questions of supreme national importance the

arbitrators were to belong exclusively to the Contracting States. The idea which, until then,[1] had prevailed in the constitution of Courts of Arbitration was that the arbitrator, or umpire if more than one, had necessarily to be a person who, by his independence and entire detachment from the interests involved, had the impartiality requisite to inspire confidence in the pure and simple application of principles of justice. It was felt that very grave issues could not thus be committed to the decision of foreign arbitrators or of a foreign umpire. The negotiators, therefore, provided that in such cases there should be neither outside arbitrators nor umpire. Furthermore, to allay fears that any great national interest might be exposed to quixotic or unpractical views taken by any single judge, it was provided that, to be binding, the decision should require the concurrence in favour of it of two out of three of the judges of either Party. This precluded, by a simple and practical method, for both countries any danger of a decision being arrived at which might shake the confidence of national opinion.

* * *

The object of the negotiators of the Treaty was manifestly to provide a further stage of

[1] See, however, Cobden's anticipation in Barclay's *Thirty Years' Anglo-French Reminiscences*, London, 1914, p. 69.

negotiation, and thus enable Governments to issue from any deadlock into which they might have drifted in the heat of controversy or under pressure of public feeling. In other words, the negotiators endeavoured to avoid the alleged shortcomings of arbitration, properly so called, and to take advantage of the fact that Joint Commissions had almost invariably been successful in settling the matters referred to them.

In fact, it may be said that the word "arbitration" in connection with such provisions was a misnomer. The Treaty was called a "Treaty of Arbitration," and the Tribunal provided for an "Arbitral Tribunal." In reality, the latter, in so far as grave national issues were involved, was a Joint Commission instituted to meet the difficulty of bringing them within the operation of a Treaty.

* * *

Negotiations, shortly after the conclusion of the Anglo-American Treaty, between the Italian and Argentine Governments resulted in a standing Treaty of Arbitration (July 23, 1896) between the two States concerned for a period of ten years. This Treaty, like the Anglo-American one, provided for arbitration in "all differences whatever the nature or cause"; but it went a great deal further, prescribing not that in certain cases the arbitrators were to be nationals of the two States, but that in all cases they were not to be citizens

of either of the Contracting States, or even to be domiciled or resident on their territory.

Neither of the above-described Treaties, however, was ratified.

So far as Great Britain is concerned, we are justified in supposing that the King, to whose prerogative treaty-making, not involving legislation or financial charges, belongs, would have been advised by his Government to ratify the Treaty. In the United States, also, treaty-making is vested in the Chief of the State, but it is so subject to his acting by and with the "advice and consent of the Senate" and "provided two-thirds of the Senators present concur." [1] When the Treaty was submitted to the Senate for ratification on May 5, 1897, there was the large majority of 16 in its favour, 42 Senators having voted for and 26 against it. A two-thirds clear majority out of 68 would have been 46. In other words, four more votes would have carried the Treaty. Mere indifference may have prevented the will of a large majority from reaching fulfilment, and a great example, on the eve of the first Hague Conference (1899), from being given to the world which might have had the weightiest consequences.

* * *

There were, nevertheless, three precedents of

[1] Constitution of the United States of America, Art. 2, Section 2.

Arbitration Courts, all three Anglo-American, on which advocates of the adoption of judicial methods in the settlement of international differences at the Hague Conference could rely as a basis for generalisation.

All three had ultimately given satisfaction, and were an encouragement to those who urged the creation of a permanent Court of Arbitration based on the principle of the Parties freely choosing their own judges.

It was, therefore, with the two then recent instances above referred to still fresh in the minds of the delegates that a permanent Court was created.

* * *

The object of arbitration, says Article 37 of the Peace Convention of 1899–1907, is "the settlement of differences between States by judges of their own choice and on the basis of respect for law." This definition at once marks the distinction between a Court of Arbitration and a Court of Law; in the latter the Parties have no discretion in the choice of their judges. We shall have to return to this definition later on in connection with the proposed International Prize Court and the American scheme of a Court of Arbitral Justice.

Meanwhile, the "International Convention for the Pacific Settlement of International Disputes," as the Hague Peace Convention in question is

entitled, provides only for voluntary or optional arbitration. All idea of compulsion is strictly excluded from it. The boldest approximation even to a recommendation of it is the statement in Article 38 that "in questions of a legal nature, and especially in the interpretation and the application of International Conventions, arbitration is recognised by the Contracting Parties as the most effective and at the same time most equitable means of settling disputes which diplomacy has failed to settle."

Another Article empowers States (a quite unnecessary authorisation) to enter into independent agreements with each other extending compulsory arbitration to such cases as they think fit !

* * *

The first such independent Treaty was the Anglo-French agreement of October 14, 1903, by which the two Contracting States obliged themselves to submit to the Hague Court "differences of a judicial order or relative to the interpretation of existing Treaties, on condition that neither vital interests nor the independence or honour of the two Contracting States nor the interests of any State other than the two Contracting States are involved."

This formula has since been followed in the numerous Treaties entered into by Great Britain and France with other States.

It is obvious that the enforcing of such a Treaty depends entirely upon the consent of both Parties, and that either Party, by raising the contention that the matter at issue is vital or involves national honour, can set it aside. By referring the cases set out in the Treaty to the Hague Court, however, all the effect intended by those who met at the Conference of 1899 has since been given to its programme so far as regards arbitration, the limitation as to "national honour" and "vital interests" having been borrowed from Article 10 of the project, submitted by the Russian Government as the basis for discussion by the Conference.

* * *

A quite reasonable objection has been raised to the costliness of proceedings before the Hague Court of Arbitration. There are cases of relatively small importance which diplomacy may not have been able to disentangle and which a new jurisdiction, unhampered by the course diplomatic negotiations may have taken, may find it easier to settle. For such cases I have drawn up the following protocol of submission which may serve in matters of indemnity as a basis for negotiation:

MODEL PROTOCOL OF SUBMISSION FOR CASES OF MINOR IMPORTANCE

The Government of..... and the Government of..... having agreed by a Convention dated....., to settle by

arbitration difficulties of the nature of that which has arisen between them with reference to..... ; and having jointly decided upon the appointment of....., who has accepted the said appointment as arbitrator therein, have concurred in the adoption of the following procedure ; subject thereto, the provisions of the Hague Peace Convention to be observed :

ART. I.—The decision of the arbitrator shall be final, unless the indemnity exceed the sum of £..... If it should exceed this sum, the award shall, nevertheless, be final, unless protested against within.....from delivery.

ART. II.—The plaintiff High Contracting Party shall, within a period of (say) one month from the signature of the present protocol, communicate to the defendant H.C.P. a memorandum containing a statement of the facts, as far as possible in tabular form, and a, as far as possible, detailed assessment of the indemnity claimed, with copies of all documentary evidence to be adduced in support thereof. The defendant H.C.P. shall have a period of (say) one month from the date of receipt of the said memorandum, etc., in which to deliver a memorandum and any copies of documentary counter-evidence in reply. The plaintiff H.C.P. shall have, from receipt of the latter, a period of (say) one month to present a counter-reply.

ART. III.—The cases and evidence, as provided for in Article II., shall be printed by the plaintiff H.C.P. and laid before the arbitrator within (say) one month after receipt of the counter-reply.

ART. IV.—If, after submission of the said cases and evidence, either H.C.P. shall apply for permission to present further materials for the arbitrator's consideration, this shall be done by a further printed statement of facts, such further statement to be simultaneously presented to the arbitrator and communicated to the other H.C.P. within fifteen days from the date at which, under Article III., the cases and evidence had been laid before the arbitrator. The other H.C.P. shall have fifteen days to reply thereto. Thereafter no further communications on either side shall be made to the arbitrator, except in accordance with Article V.

ART. V.—The arbitrator shall be entitled, at any time until delivery of his award, to ask for such explanations from either or both H.C.P. as he may deem fit.

ART. VI.—The costs of the arbitration shall be fixed by the arbitrator, and shall be borne share and share alike by the H.C.P.

ART. VII.—The arbitrator shall deliver his decision within a period of (say) three months from the date of the receipt by him of the last communication made to him by either H.C.P. in accordance with the terms of the present protocol.

ART. VIII.—A copy of the award shall be delivered to each H.C.P., the original to be kept in the archives of the Hague Court.

CHAPTER VI

NATIONAL HONOUR AND VITAL INTERESTS

When Lord Salisbury set out to conclude his Treaty of "arbitration" with the United States, he was much exercised to find a method of making such a Treaty applicable to the kind of differences which, as we have seen, are usually regarded as lying beyond the scope of arbitration.

Nobody has explained the difficulty of finding such a method more clearly and pointedly than Lord Salisbury himself in his letter to M. Bayard of March 3, 1896, enclosing the draft heads of the Treaty cited in the last chapter.

Cases (he said) that arise between States belong to one of two classes. They may be private disputes in respect to which the State is representing its own subjects as individuals, or they may be issues which concern the State itself considered as a whole. A claim for an indemnity or for damages belongs generally to the first class, a claim to territory or sovereign rights belongs to the second. For the first class of differences the suitability of international arbitration may be admitted without reserve. It is exactly analogous to private arbitration, and there is no objection to the one that would not equally apply to the other. There is nothing in cases of this class which should make it difficult to find capable and impartial arbitrators. But the other class of disputes

stands on a different footing. They concern the State in its collective capacity, and all the members of each State, and all other States who wish it well, are interested in the issue of the litigation. If the matter in controversy is important, so that defeat is a serious blow to the credit or the power of the litigant who is worsted, that interest becomes a more or less keen partisanship. According to their sympathies, men wish for the victory of one side or the other.

Such conflicting sympathies interfere most formidably with the choice of an impartial arbitrator. It would be too invidious to specify the various forms of bias by which, in any important controversy between two Great Powers, the other members of the commonwealth of nations are visibly affected. In the existing condition of international sentiment, each Great Power could point to nations whose admission to any jury by whom its interests were to be tried it would be bound to challenge, and in a litigation between two Great Powers the rival challenges would pretty well exhaust the catalogue of the nations from whom competent and suitable arbiters could be drawn. It would be easy but scarcely decorous to illustrate this statement by examples. They will occur to anyone's mind who attempts to construct a panel of nations, capable of providing competent arbitrators, and will consider how many of them would command equal confidence from any two litigating Powers.

This is the difficulty which stands in the way of unrestricted arbitration. By whatever plan the Tribunal selected, the end of it must be that issues in which the litigant States are most deeply interested will be decided by the vote of one man, and that man a foreigner. He has no jury to find his facts, he has no Court of Appeal to correct his law, and he is sure to be credited, justly or not, with a leaning to one litigant or the other. Nations cannot afford to run such risk in deciding controversies by which their national position may be affected or a number of their fellow-subjects transferred to a foreign rule.

The plan which is suggested in the appended draft Treaty[1]

[1] *See* p. 45.

would give a Court of Appeal from the single voice of a foreign judge. It would not be competent for it to alter or reverse the umpire's decision, but if his judgment were not confirmed by the stipulated majority, it would not stand. The Court would possess the highest guarantee for impartiality which a Court belonging to the two litigating nations would possess. Its operation in arresting a faulty or doubtful judgment would make it possible to refer great issues to arbitration without the risk of a disastrous miscarriage of justice.

I am aware that to the warmer advocates of arbitration this plan will seem unsatisfying and imperfect. But I believe that it offers an opportunity of making a substantial advance, which a more ambitious arrangement would be unable to secure, and if, under its operation, experience should teach us that our apprehensions as to the danger of reposing an unlimited confidence in this kind of Tribunal are unfounded, it will be easy, by dropping precautions that will have become unnecessary, to accept and establish the idea of arbitration in its most developed form.

Lord Salisbury's draft[1] consequently provided for appeal in certain cases, and contained a proviso that any difference which in the judgment of either Power materially affected its honour or the integrity of its territory should not be referred to arbitration under the Treaty except by special agreement. This proviso was ultimately abandoned, but, as has been seen, the final text of the Treaty provided for dealing with such cases or, as stated in the Treaty, with cases of "territorial claims" and "questions of principle of grave general importance affecting the national rights," by what was practically to

[1] *See* p. 45.

be a Joint Commission with pre-determined powers of final decision.[1]

* * *

A year later (August 12, 1898), the Czar submitted his project of holding the Peace Conference which was held in 1899. Though called more expressly to deal with the question of excessive armaments, the scheme of work laid before the Conference embraced among the subjects for discussion a draft Treaty for the adoption of compulsory arbitration. It did not, however, even suggest any solution of the difficulty Lord Salisbury had pointed out and sought to overcome.

Article 10 of this draft, indeed, provided that arbitration should be obligatory in the cases enumerated in it, but only "in so far as not affecting the vital interests or national honour of the Contracting States." This was the origin of the now time-honoured exception, which was first adopted in the Anglo-French Treaty and has since been copied in the numerous Treaties for which it has served as a model.

* * *

If we eliminate the cases which are certainly not vital, we find a residue of cases which cannot be settled by an award of damages, such as cases

See p. 178.

involving a State's territorial independence or integrity, its freedom to determine its own mode of government, legislation and institutions, its power to receive political refugees from other countries, its right to grant absolute freedom of thought and of its expression even as regards matters beyond its boundaries, etc. We may regard these as "vital."

"National honour" is very like a "vital interest," but it generally arises out of the overheated discussion of some question which may have been originally merely a judicial one. In the hands of an unskilled diplomacy every question can become one of national honour, and very often what is called "national honour" is merely a one-sided view of a question in which "honour" plays very little part.

"The exception of honour," once said Lord Bryce, "is of very doubtful merit, because questions of so-called national honour are often just the questions which most need to be referred to arbitration, inasmuch as they are those which a nation finds it hardest to recede from when it has once taken up a position, so that the friendly intervention of a third party is especially valuable. The value of arbitration, or of conciliation, by a third party lies not merely in its providing a means of determining a difficult issue of law or fact, but in its making it easy for the Contracting

Parties to abate their respective pretensions without any loss of dignity." [1]

The term "national honour," in fact, is so vague and elastic that it is difficult to see what cases it might not be made to cover, and though arbitration has never ceased to be regarded by some Foreign Offices with distrust, public opinion all over the world expected so much, and after the war will probably expect so much more, from it as an ultimate substitution for war, that a term a little more precise and yet fulfilling the purpose pointed out by Lord Bryce would be welcomed. I suggested in 1907 [2] that both "vital interest" and "national honour" might be replaced by the term, "not affecting the internal laws or institutions or independence or territorial integrity of either Contracting State." [3]

* * *

The difficulties which Lord Salisbury pointed out did not prevent several States, however, from

[1] Congress of Jurists, 1904, Report, p. 27.

[2] See *Problems of International Practice and Diplomacy*, pp. 145, 148. A clause in the following form is probably all that "vital interests" probably can be held to mean: "All difficulties which it has not been possible to settle by diplomatic methods, and *affecting neither the independence nor territorial integrity nor the internal laws or institutions* of any such H.C.P., nor matters involving prior arrangements of any H.C.P. with third Parties."

[3] The Interparliamentary Union has suggested for the wording of the "national honour" exception: "So far as they do not affect either their independence or vital interests, or the sovereign authority of the respective countries, or the interest of third Powers."

entering into Treaties covering all differences between them without exception.

Such unlimited Treaties have been concluded between Argentina and Chile (1902), Denmark and the Netherlands (1904), Denmark and Italy (1905), Denmark and Portugal (1907), Italy and Argentina (signed at the Hague in 1907 during the Peace Conference), and Italy and the Netherlands (1909). Except in the case of the Treaty between Argentina and Chile, these Treaties, it is seen, are confined to States between which war is a most unlikely contingency.

The difficulty is to devise a form which will embrace all cases on lines analogous to those of the Salisbury Treaty above described,[1] or a form which is capable of more or less automatic extension to cases not specifically provided for.

* * *

A form of Treaty of the last-mentioned kind is that which was signed between France and Denmark on August 9, 1911.

Its first provisions are in the usual terms, viz.:

> Differences of juridical character, and more particularly those relating to the interpretation of Treaties existing between the two Contracting Parties, which may arise between them and which it has not been possible to settle by diplomacy, shall be submitted to arbitration, in the terms of the Convention for the Pacific Settlement of International Differences, provided they do not affect the vital interests, independence

[1] *See* p. 56, 176 *et seq.*

or honour of either of the Contracting Parties, nor the interests of third Powers (Art. 1).

To this principle, however, another Article provides exceptions. "Differences relating to the following matters," says Article 2, "shall be submitted to arbitration without the reservations mentioned in Article 1":

1. Pecuniary claims for damages when the principle of an indemnity has been admitted by the Parties;
2. Contractual debts claimed from the Government of one of the Parties by the Government of the other as due to its nationals;
3. Interpretation and application of commercial and navigation agreements;
4. Interpretation and application of conventional stipulations relative to the following matters: Industrial property, copyright, posts and telegraphs, submarine cables, etc. etc.

It is further provided in this Treaty that in respect of the matters referred to in class 4 of these exceptions, the Contracting Parties have the right to defer submitting such cases to arbitration until after the national Courts have decided finally on them.

Lastly, the Treaty in question contains a clause providing that the Arbitrators shall decide in case of a difference of opinion between the Contracting States, as to whether a case belongs to the one or the other category.

This is a most interesting Treaty, perhaps the best drawn in existence, and, as convener of the

Arbitration Committee of the Institute of International Law, I have taken it as the basis of my suggestions in drafting a model form for general acceptance in view of the third Hague Conference,[1] which will no doubt be held in due course after the present conflict is over.

* * *

The Anglo-American Treaty of Arbitration of August 3, 1911, is a most interesting new departure in the effort to deal with "vital interests" by pacific means, but, like those of the Treaty of 1897, its methods are only partly those of arbitration.

The Treaty, in fact, sets out by restricting the scope of arbitration to differences relating to international matters in which the High Contracting Parties are concerned "by virtue of a claim of right made by one against the other under Treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law and equity." It does not, however, provide that arbitration, even when applicable, shall forthwith come into operation, but presents a certain number of preliminary stages which may be summed up as follows :

1. Request by either Party to submit any

[1] *See* p. 114 *et seq.* See also *Annuaire de l'Institut de Droit International.*

differences between the Parties to a Joint High Commission of Inquiry ;

2. Power to either Party to postpone the reference to the High Commission for one year from the date of the request therefor, in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy if either Party desires such postponement ;

3. Appointment by each Party of three of their nationals, these to form the Joint High Commission ;

4. Holding of the inquiry by the Joint High Commission, the inquiry to be followed by a report upon the " particular question or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate " ;

5. If the difference persists, the case, unless it is excluded by the terms of Article 1, as set out above, becomes the subject of an agreement of reference to arbitration, which is to provide for the organisation of the Tribunal, define the scope of the arbitration and determine the question or questions at issue.

The obvious object of the Treaty is to create a series of steps calculated to divert attention from the issue to the method of settlement, and

thus enable diplomacy to gain time, while providing the means of obtaining a calm examination of the points involved. One of its chief merits certainly is the ingenuity with which the procedure of conciliation and settlement is prolonged, and, when two Governments are equally desirous of a peaceful adjustment, it will secure the immediate removal of any questions, whether arbitral or not, from discussion on the part of an over-zealous public opinion.

* * *

Nearly all the standing Treaties hitherto concluded or renewed, however, exclude "national honour" and "vital interests" from their operation. It would appear as if few Governments were as yet ready to take the responsibility of binding themselves to arbitrate without a means of escape from the obligation. The new Treaties between Great Britain and the United States, and the United States and France, it has been seen, are no exception. Though they provide for investigation by a preliminary Joint Commission of Inquiry for all cases whatsoever, they confine arbitration to claims of right justiciable in their nature by the principles of law and equity (Art. 1). This obviously excepts from arbitration all questions based on policy and not on grounds of legal right, which amounts for practical purposes to the adoption under another formula of

the vital interest clause, and any interest is vital till the sense of the term becomes fixed, if either Party choose so to describe it.

* * *

Under existing Treaties among European States, it is seen, it is in the discretion of either Party to a dispute to describe the difference as involving a "vital interest" and remove it from the operation of the Treaty. An aggressor, as I have said, who has no equitable grounds on which to base an application to the Hague Court or to any other Tribunal of independent judges, is obviously not likely to accept jurisdiction which would practically have no alternative but to find against him. Thus, in his ultimatum to Turkey (September 26, 1911), the Marquis di San Giuliano took care to state that the issue between his country and Turkey constituted, "so far as Italy is concerned, a vital interest of the very first order." This was evidently intended to enable his Government to set up the exception against any suggestion of arbitration. Italy happened to be the European State which had had most courage in concluding Treaties in which no such exception figured!

Though States of the first rank are so reluctant to agree to the enlargement of the scope of arbitration, we must not overlook the fact that there is something to be said in favour of providing a

loophole by which either Contracting Party can escape in any particular emergency from its obligations. Treaties between nations, unfortunately, are not exactly in the same position as contracts between individuals. The best sanction they have is the sense of honour and justice of the Contracting Parties, and it may be argued that it will always be better to let a State escape from a Treaty through its own provisions than by violating them.

Meanwhile, under a form like the Franco-Danish,[1] it would be possible to carry out the late Lord Salisbury's idea of extending the scope of a Treaty, as experience warranted, not, it is true, as he proposed by dropping precautions, but by deliberately adding to the range of its operation.

[1] *See* p. 195.

CHAPTER VII

THE EXISTING AND PROPOSED HAGUE COURTS

THE most novel and most striking work achieved by the first Hague Conference (1899) was unquestionably the creation of the Permanent Court of Arbitration for the decision of international differences. It was the boldest effort ever made by statesmen to substitute, in the settlement of such differences, law and justice for brute force.

There is something colossal in the very idea of a Court of Justice for the decision of differences between States. One thinks of the graduation of our national Courts, of how our judicial organisation provides an ever higher rank and greater function as it ascends from rung to rung in the hierarchy, and yet the highest rung only deals with very small matters compared with the immense interests which may be involved in the decision of an international issue. One's sense of proportion asks what kind of judges are great enough to inspire awe and confidence in the mighty litigants who are to lay aside their swords and

humbly submit their differences to this highest jurisdiction of mankind.

But, in fact, the Court instituted is not truly a Court of Justice in the ordinary sense of the term at all. The novelty, and a momentous one it was, and as a foundation necessary before a true Court of Justice could be reared, lay in the centralising at the Hague of all methods for the pacific settlement of international disputes which diplomacy had failed to adjust. As regards arbitration, the chief of these methods, the creation of a panel of judges, had a very particular theoretical significance. It was necessary to the idea of a Court, not only that it should have its registrar, its records and its managing staff, but also its potential, in the absence of actual, judges. It must not be forgotten that a moral institution is like a building. Confidence in the foundations must precede the raising of the structure.

* * *

The Hague Convention provided that within the three months following its ratification, each Power should select four persons of known capacity in questions of international law, of the highest moral reputation and disposed to accept the duties of arbitrators, to be inscribed as members of the Court. Two or more Powers can agree on the selection in common of one or more members, and the same person can be selected by different

Powers. It provides also that when the Contracting Powers have recourse to the Court, the arbitrators shall be chosen from its list. Another Article, moreover, provides that, though the Court is competent for all arbitration cases, the Parties may agree to institute a special Tribunal, and that the International Bureau at the Hague is authorised to place its premises and its staff at the disposal of any such special Tribunal.

All this shows the tentative character of the Hague Court. In restraining their ambition the delegates were well advised, for otherwise they might never have reached any practical result at all. Even in spite of the tentative character of the new institution, it was some time before Foreign Offices could be brought to acknowledge its existence, and for three years after it was created it remained like a marble monument, grand but useless, a mere record of the work of Peace it symbolised. At length the United States and Mexico gave it its first trial. The two great Republics of North and Central America came across the Atlantic to the home of Grotius and submitted a difference between them to the jurisdiction of the new and untried Court, as Baron Descamps, the eminent Belgian Senator who pleaded the case, said, "to give a lesson to the Old World." The example set by the United

States and Mexico has now been followed by Great Britain, France, Germany, Italy, Belgium, Venezuela, Sweden and Norway, Russia, Spain, Portugal, Turkey, Holland, Japan and Peru.

* * *

The cases which have been tried by the Hague Court since October 1902, the date of its first case, now number sixteen—a sufficient number to afford a very good idea of the capabilities of the Court,—and are in themselves interesting not only as precedents but as specimens of arbitrable cases which arise between States.

They are as follows :

1. United States *v.* Mexico (pious funds of the Californias) Award, Oct. 14, 1902 ;
2. Great Britain, Italy and Germany *v.* Venezuela (preferential claims). Award, Feb. 22, 1904 ;
3. France, Great Britain and Germany *v.* Japan (Japanese house-tax). Award, May 22, 1905 ;
4. France *v.* Great Britain (Muscat Dhows). Award, Aug. 8, 1905 ;
5. France *v.* Germany (deserters at Casablanca). Award, May 22, 1909 ;
6. Norway and Sweden (frontier). Award, Oct. 23, 1909 ;
7. Great Britain *v.* U.S.A. (North Atlantic Coast Fisheries). Award, Sept. 7, 1910 ;
8. U.S.A. *v.* Venezuela (Orinoco S.S. Co. claim). Award, Oct. 25, 1910 ;
9. France *v.* Great Britain (arrest and surrender of Savarkar). Award, Feb. 24, 1911 ;
10. Italy *v.* Peru (Canevaro claim). Award, May 3, 1912 ;
11. Russia *v.* Turkey (claim for unpaid interest). Award, Nov. 11, 1912 ;

12 and 13. France *v.* Italy (seizures of the *Carthage* and *Manouba*). Award, May 6, 1913;
14. France *v.* Italy (seizure of the *Tavignano* and firing on Tunisian vessels *Kamouna* and *Gaulois*). Settled out of Court;
15. Netherlands *v.* Portugal (frontiers in island of Timor). Pending;
16. Spain, France, Great Britain *v.* Portugal (seizure of pious funds in Portugal). Pending.

1. The first case related to a Roman Catholic fund formed in the eighteenth century for the purpose of converting native Indians to Christianity and maintaining a priesthood in Upper and Lower California, then a part of Mexico. By a decree of 1842, this fund was transferred to the Mexican Government, which undertook to pay interest thereon in perpetuity in furtherance of the design of the original donors. After the sale of Upper California to the United States in 1848, the Mexican Government having refused to pay the proportion of the interest to which Upper California was entitled, the question of liability was referred to Joint Commissioners. On their failing to agree, Sir Edward Thornton, British Minister at Washington, who had been appointed umpire, in 1875 found there were due from Mexico to Upper California, represented by its bishops as administrators of the fund, arrears of interest amounting to a sum of nearly £100,000, which was directed to be paid in gold. This award was carried out, but payment of the

further accruing interest was withheld, *i.e.*, from October 24, 1868. Ultimately, by agreement between the two Governments, the settlement of the dispute was referred to the Hague Tribunal, the points to be determined being (1) Whether the matter was *res judicata* by reason of Sir Edward Thornton's award, and (2) whether, if not, the claim for the further interest was just. The Court decided both questions in the affirmative, Mexico to pay the annual sum claimed not in gold but "en monnaie ayant cours légal au Mexique," Sir E. Thornton's direction as to payment in gold applying to the mode of the execution of the award only, and therefore not being *res judicata*.

2. In the second case, it had been agreed that payment of a certain claim by Great Britain, Germany and Italy on behalf of their respective subjects against the Venezuelan Government should be secured on 30 per cent. of the customs revenue collected at two Venezuelan ports. An attempt having been made by Great Britain, Germany and Italy to enforce their claims by blockade, a further question arose as between these three Powers, on the one hand, and the United States, France, Spain, Belgium, the Netherlands, Sweden and Norway and Mexico, which had claims against Venezuela but had taken no part in the blockade, on the other, as to whether the blockading Powers were entitled to pre-

ferential treatment. The arbitrators decided unanimously in favour of granting preferential treatment to the blockading Powers, and ordered payment of their claims out of the 30 per cent. of the customs revenue of the two Venezuelan ports appropriated to meet them.

3. The third case, which was between Great Britain, France and Germany on the one hand, and Japan on the other, dealt with a dispute relating to the legality of a house-tax imposed by Japan on certain subjects of the Powers concerned who held leases in perpetuity. It turned upon the construction of Treaties entered into between the European Powers in question and Japan in 1894 and 1896. The Court decided against the Japanese construction of the Treaties in question.

4. The fourth had reference to an alleged misuse of the French flag at Muscat, capital of the kingdom of Oman, on the S.E. coast of Arabia. Oman is ruled by a sultan, whose independence Great Britain and France had, by Treaty in 1862, engaged to respect. France had, nevertheless, issued to certain native dhows, owned by subjects of the Sultan, papers authorising them to fly the French flag, not only on the Oman littoral but in the Red Sea. A question arose as to the manner in which this authorisation affected the jurisdiction of the Sultan over such dhows, the masters of which took advantage of their immunity from

search to carry on contraband trade in slaves, arms and ammunition. The Court decided that the owners or masters of dhows, though duly authorised to fly the French flag, did not enjoy, in consequence of that fact, any such immunity as would exempt them from the sovereignty and jurisdiction of the Sultan, as such exemption would be contrary to the reciprocal engagement entered into to respect the Sultan's independence.

5. The case of the deserters of Casablanca was one which, had the relations between Germany and France been good, would probably never have arisen at all. In the French army there is a "foreign legion" used for colonial service. Six privates belonging to it deserted, and obtained passports from the German Consulate at Casablanca. They were supposed to be, all of them, German subjects. It turned out eventually that only two of the six were Germans. The deserters were arrested, in spite of some resistance on the part of persons in the service of the Consulate. Hot words passed in the newspapers, but the two Governments agreed to refer the matter to the Hague Court, which gave its decision in favour of France on grounds too obvious to require examination.

6. The case between Sweden and Norway turned on a frontier question which arose out of the separation of these two States. It was

decided in favour of Sweden without a murmur on the part of the Norwegians.[1]

7. The case of the North Atlantic Fisheries [2] was the most important of the matters which have as yet been dealt with by the Hague Court, not only on account of the gravity of the issue generally, but also on account of the different delicate questions dealt with in the award. The case related to the respective British and American rights in Newfoundland waters under Article 1 of the Anglo-American Convention of October 20, 1818. This Article provided that the inhabitants of the United States should for ever, in common with British subjects, have liberty to take fish of every kind on certain specified coasts of Newfoundland, and that they should also for ever have liberty to dry and cure fish in any of the unsettled bays, harbours and creeks on the specified parts of the southern shores of Newfoundland and of the coast of Labrador, but that so soon as any portion thereof became settled it would not be lawful for the American fishermen to dry or cure fish thereat without previous agreement for such purpose with the inhabitants, proprietors or possessors of the ground. The United States,

[1] The arbitrators were MM. Loeff, Beichmann and Hammerskjold. M. Loeff was a Dutch Ex-Minister of Justice.

[2] The arbitrators were Professor Lammasch of Vienna (President), Dr. Savornin-Lohman, Dutch Minister of State; Judge George Gray, Sir Ch. Fitzpatrick and Dr. Drago, Ex-Minister of Foreign Affairs of the Argentine Republic.

on the other hand, renounced liberty to take, dry or cure fish on or within three marine miles off any of the British American coasts, bays, creeks or harbours not included within the specified limits. American fishermen, however, had the right to enter such bays and harbours for the purpose of shelter or repairs, the purchase of wood and the obtaining of water, but they were to be under such restrictions as might be necessary to prevent any abuse of the privileges reserved to them.

Differences arose as to the scope and meaning of these provisions. The British authorities claimed the right to deal in their regulations with the hours, days and seasons when the fish may be taken, with the methods, means and implements used in fishing operations, etc. There was also a difference of view between the British and American authorities as to the mode of measuring the three marine miles off any of the coasts, bays, creeks or harbours referred to in the Article. Besides these, there were a number of other more or less subsidiary points submitted to the Court.

The award confirmed the British claim to make such regulations as were appropriate or necessary for the protection and preservation of the fisheries or desirable or necessary on grounds of public order and morals, provided they did

not unnecessarily interfere with the fishery itself and were not so framed as to give an advantage to local over American fishermen. Any question as to the reasonableness of any regulation was to be referred to a Commission of three expert specialists, one to be designated by each of the Parties and the third not to be a national of either Party and to be appointed by the Court.[1]

To enable the Governments to deal with any difference of views between them before resorting to the Commission, the Court recommended official publication of any regulations as to hours, days and seasons for taking fish, as to methods, means, implements, etc., two months before their coming into operation, to enable the United States Government to raise any question as to their inconsistency with the Treaty of 1818, in which case the Commission would decide on the difference between the two Governments.

On the question of the mode of measuring the three marine miles, the Court decided that in case of bays, the three marine miles should be measured from a straight line drawn across the body of the water at the place where it ceases to have the configuration and characteristics of a bay. At all other places, the three miles were

[1] The Court appointed Dr. P. P. C. Hoek, scientific adviser to the Netherland Fisheries. The other members who have since been appointed are Dr. Hugh Smith, on behalf of the U.S.A., and the Hon. Donald Morison, Newfoundland, Minister of Justice.

to be measured following the sinuosities of the coast. It recommended, however, the method followed in the North Sea Fisheries Convention of May 8, 1882, of fixing the line at the part of the bay nearest the entrance where the width does not exceed ten miles. From the operation of this general proposition the award excepted a certain number of bays "where the configuration of the coast and the local climatic conditions are such that foreign fishermen, when within the geographic headlands, might reasonably and *bona fide* believe themselves on the high seas," and fixed for these certain points between which the line should be drawn.

This long, detailed award, of which the above, long as it is, is merely a summary of its chief provisions, is full of interesting points connected with fishery methods, territorial waters and bays, and will certainly have considerable influence in the treatment of similar matters in the future.

8. The Orinoco S.S. Co. claim between the U.S.A. and Venezuela raised the question of whether, in case an umpire exceeds his powers and bases his decision on errors of law and fact essential to the matter at issue, the award is liable to revision. The Court's decision on this point, which establishes a precedent of the greatest moment for the future, was as follows:

Whereas it is assuredly in the interest of peace and the development of the institution of international arbitration, so essential to the well-being of nations, that on principle such a decision be accepted, respected and carried out by the Parties without any reservation as it is laid down in Article 81 of the Convention for the Pacific Settlement of International Disputes of October 18, 1907; and, besides, no jurisdiction whatever has been instituted for reconsidering similar decisions.

But whereas, in the present case, it having been argued that the decision is void, the Parties have entered into a new agreement under date of February 13, 1909, according to which, without considering the conclusive character of the first decision, this Tribunal is called upon to decide whether the decision of Umpire Barge, in virtue of the circumstances and in accordance with the principles of international law, be not void, and whether it must be considered so conclusive as to preclude a re-examination of the case on its merits;

Whereas, by the agreement of February 13, 1909, both Parties have at least implicitly admitted, as vices involving the nullity of an arbitral decision, excessive exercise of jurisdiction and essential error in the judgment (*exceso de poder y error esencial en el fallo*);

Whereas the plaintiff Party alleges excessive exercise of jurisdiction and numerous errors in law and fact equivalent to essential error;

Whereas, following the principles of equity in accordance with law, when an arbitral award embraces several independent claims, and consequently several decisions, the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and good faith of the arbitrator are not questioned, this being ground for pronouncing separately on each of the points at issue.

The Court proceeded to the revision accordingly.

9. The Savarkar case turned on the delicate question of whether a fugitive under a criminal charge, who had escaped from the ship on which

he was being conveyed to his place of trial (India), and had been arrested by the police of the country (France) to which he escaped and handed over immediately (in error) by that police to those in charge of him, should not have been delivered back to the Government of the State to which he had escaped and dealt with under the extradition Treaty between the two States concerned. The arbitrators decided that, as in the circumstances there had been no *atteinte à la souveraineté* of the country to which he had escaped, and all parties had acted in good faith, and no disavowal of the surrender was made known till two days after the departure of the vessel, the act of the local police, though done in error, closed the incident. This decision, based on considerations outside the strictly legal question involved, marks the difference between arbitrators, who as such can disregard technical questions, and a Justiciary Court which has little latitude when confronted with an unquestioned and legal principle, such as the universal one that a fugitive who sets foot on foreign soil is beyond the jurisdiction of the police of his country except by and through the operation of a Treaty of extradition. The fact that the French Government made a claim shows that it had not waived its right. Though it is evident that, if France had declined to grant the extradition (which she very possibly

would have done), the liberation of Savarkar might have led to difficulties, the precedent is an unfortunate one, and should be regarded rather in the light of a compromise necessary in the circumstances than in that of a judicial decision.

10. The Canevaro affair between the U.S.A. and Peru arose out of a loan made to the Dictator Pierola in 1880 by semi-Italian bankers. The question turned on an assessment involving no principle of any general interest.

11. The Turco-Russian case related to a claim of interest on an indemnity payable by Turkey to Russian claimants or their nominees, which had been satisfied after long intervening delays. The arbitrators, while admitting the justice of the claim in principle, decided against Russia, on the ground that the Russian Government, when accepting instalments, never made any reserve as to interest, but the award, far from satisfactorily establishing the justice of the decision, is even self-contradictory.

12 and 13. The *Carthage* affair arose out of the stoppage and temporary seizure of a French mail-ship by the Italian naval authorities during the Turco-Italian War. In the *Manouba* case the seizure was complicated by the arrest of Ottoman passengers.

These two cases would have been tried by the International Prize Court of Appeal had

it been in existence.[1] The fact that they were tried by the ordinary Hague Court and existing procedure shows that the alleged injustice suffered by British vessels at the hands of the Russian national Courts was capable of remedy without waiting for the ratification of the Prize Court Convention, and in fact is still so.

14. The *Tavignano*, etc., case gave rise to no decision, having been settled out of Court; and 15 and 16, the two last mentioned, are still pending.

* * *

An attentive reader will have observed that none of the cases which have as yet been submitted to the Hague Court involved acute difficulties. In the wars which, since 1899, have actually taken place, viz., the Russo-Japanese, Turco-Italian or Balkan Wars, and the present gigantic conflict, there was really no arbitrable matter of essential importance. In all of them, moreover, the aggressor was in such haste to "get his blow in first" that hostilities were already in full operation before other States had time to realise that war had broken out or had any precise idea of the nature of the aggressor's grievances.

* * *

It is beyond the scope of a short volume like the present to examine in detail the legal effect of these different awards, or their grounds, motives

[1] *See* p. 168.

and recitals, but I may say that several have been severely criticised from the point of view of law and justice ; but law and justice, I repeat, are not the only considerations in cases of arbitration.

The report of the Savarkar case showed that the arbitrators, by consent of the Parties, were settling the question in the best way possible under the circumstances. Savarkar, without question, was legally free the moment his feet touched French territory, but as he had been handed back by the French police, and as, by the time the Hague case came on for trial, he was already in the hands of justice in India, to have decreed that he should be released might have given rise to much complication, which the award averted.

In the Turco-Russian case positive injustice was done to the interested Parties. The case was decided in favour of Turkey, probably because the Russians originally interested were no longer concerned, and the Russian representatives may not have pressed a claim to which their nationals had become indifferent.

In other cases, the decisions have been based less on the idea that the mission of the arbitrators is to give their decision in strict accordance with law, than on that they must find a method of closing the matter with the minimum of ill-feeling on either side.

* * *

A Court of Arbitration, in fact, can seldom be guided by purely judicial considerations. The principle of *lex dura sed lex* is obviously out of place in an institution, the object of which is to substitute pacific for coercive methods.

The large number of cases which are reversed on appeal shows that even in our national courts justice is often merely a term for decision between two rival claims both equally arguable. When a case is reversed on appeal, and the defeated litigant is converted from the position of victorious into that of the defeated party, one may ask if a compromise would not have been more just. It is obvious that in international cases, to steer between the arguments of Parties who regard their case with an equal conviction of justice being on their side, is more strictly in conformity with the objects of arbitration than to give a strictly legal decision which, if a grievance resulted, would discourage recourse to this method of settling differences.

Nevertheless, it has been felt by many that an independent Court of Justice on the model of the national Courts, with permanent judges ready at all times to deal with cases presented to it, is desirable. At the Hague Conference the American delegates insisted upon this requirement, and, in response to their suggestion, a recommendation for the constitution of a Court

of Arbitral Justice was adopted, the scheme of which figures as an appendix to the final act of the Conference.[1]

Secretary Root, who was a partisan of such a Court, had instructed the American delegates to point out to the Conference that "the method in which arbitration can be made more effective so that nations may be more ready to have recourse to it voluntarily" had been indicated by "observation of the weakness of the existing system." There was no doubt, he said, that the principal objection to arbitration rested not upon the unwillingness of nations to submit their controversies to impartial arbitration, but upon an apprehension that the arbitration to which they submitted might not be impartial. It had been a very general practice for arbitrators to act not as judges deciding questions of fact and law upon the record before them under a sense of judicial responsibility, but as negotiators effecting settlements of questions brought before them, in accordance with the traditions and usages and subject to all the considerations and influences which affect diplomatic agents. The two methods were radically different, proceeded upon different standards of obligation and frequently led to widely differing results. "It very frequently happens," he added, "that

[1] *See* p. 159 *et seq.*

a nation which would be very willing to submit its differences to an impartial judicial determination is unwilling to subject them to this kind of diplomatic process. If there could be a Tribunal which would pass upon questions between them the same impartial and impersonal judgment that the Supreme Court of the United States gives to questions arising between citizens of the different States, or between foreign citizens and citizens of the United States, there can be no doubt that nations would be much more ready to submit their controversies to its decision than they are now to take the chances of arbitration." "It should be your effort," he instructed, "to bring about in the second Conference a development of the Hague Tribunal into a permanent Tribunal composed of judges who are judicial officers and nothing else, who are paid adequate salaries, who have no other occupation, and who will devote their entire time to the trial and decision of international causes by judicial methods and under a sense of judicial responsibility. These judges should be selected from the different countries, in order that the different systems of law and procedure and the principal languages shall be fairly represented. The Court should be made of such dignity, consideration and rank that the best and ablest jurist shall accept appointment to it, and that the whole

world will have absolute confidence in its judgments."

The scheme set out in the appendix to the Hague Convention [1] was the result of deliberations ably conducted under the auspices of the late Mr. Choate, chief American delegate, and his indefatigable lieutenant, Dr. James Brown Scott, the American legal expert at the Hague Conference of 1907.[2]

* * *

The Hague Conference of 1907, however, not only drew up the scheme of a Court of Arbitral Justice. As already mentioned, it also drew up a scheme of an International Court of Prize. There are, therefore, two International Courts for which provision has been made apart from the existing Court.

The International Prize Court was created to act as a Court of Appeal from decisions of the national Prize Courts in cases concerning neutral property and persons, enemy goods on board neutral vessels, etc.—in fact, in all cases which are regarded in international practice as within the Prize Court jurisdiction.

[1] *See* p. 159 *et seq.*

[2] Dr. James Brown Scott's services to international law are numerous. He was not only the founder of the American Society of International Law and its admirably edited *Journal*, but, as director of the legal section of the organisation founded to deal with Mr. Carnegie's magnificent gift to the cause of peace, he is as indefatigable in connection with it as he has been in all the other work he has undertaken.

This proposed special Court does not fall within the scope of the present volume, except in so far that it belongs to the work of internationalising justice where the partiality of the judges may reasonably be questioned. Secretary Knox, on behalf of the United States Government, suggested a fusion of this Court with the proposed Court of Arbitral Justice. Cases within the proposed International Prize Court's jurisdiction[1] have been referred to the existing Court and under the existing regulations. This fact foreshadows the possibility of shaping the constitution of the existing Hague Court in such a way as to divide it into sections corresponding to the different needs of international justice.

* * *

In spite of this abundance of proposed Courts, jurisdictions and regulations, we are still far from bringing within the jurisdiction of pacific methods possible causes of war and the realisation of the spirit of impartial justice even in matters which, though they occasion ill-feeling dangerous to peace, are not in themselves of a nature to directly provoke war.

Justice, after all, is in itself rather an ideal than a reality. The necessity of adopting procedure to bring cases to an end, the uncertainty of evidence, the fact that a decision must be given

[1] *See* p. 168.

upon the evidence forthcoming, whether complete or not, the different temperaments and prejudices inherent to our faulty human nature of both judges and advocates, their differing degrees of ability, circumstances, pressure of business, accidents of procedure, all tend to qualify, impede and distort justice as given in Courts at Law.

The best, perhaps after all, that we can get from an International Court of Arbitration is not necessarily justice, but a settlement which closes the incident or grievance and permits of its being eliminated from both national and international preoccupations and becoming as soon as possible a thing of the past.

CHAPTER VIII

INTERNATIONAL COMMISSIONS OF INQUIRY

When the Russian Government in January 1899 tabulated its agenda for the discussions of the proposed Hague Conference, the first subject on the list was the main question of how to effect some contractual limitation of armaments, the exclusion of certain weapons from warfare, the interdiction of the dropping of projectiles from balloons, the prohibition of submarine torpedo-boats, the codification of the practice of war, the adaptation of the principles of the Geneva Convention to naval warfare and, lastly, the acceptance of good offices, mediation and voluntary arbitration, and the establishment of a uniform practice in connection with them.

When this agenda, more fully elaborated by the Russian Government, was laid before the Conference, it contained as a sort of afterthought draft Articles for the institution of a new method entitled "International Commissions of Inquiry."

Of the different matters discussed, the main question relating to armaments led only to an

expression of pious wishes, and no heed whatever in practice has been paid to the suggested limitation of the destructive agencies it was proposed to forbid.

As regards pacific methods of adjusting international differences, the Russian Government attached by far the greater importance to good offices and mediation, which seemed at the time the most progressive of pacific methods among those available. It was proposed to empower neutral States at all times to offer their mediation as a matter of right, justified by community of international interests and the interdependence of civilised nations. We have seen in another chapter that this method now bids fair to justify the Russian expectations.

The proposal of a standing Court of Arbitration was also an afterthought. It came from England, supported by the United States.

Of the different pacific methods adopted, the only one which can be said with quasi-certainty to have averted war was just the new one of "International Commissions of Inquiry." This experience shows the utility of making all possible additions to the machinery of peace, however small may appear at the time their chance of being put in practice.

* * *

The occasion on which the insignificant clauses

of the Peace Convention relating to this new institution saved Europe from war is now known as the "Doggerbank incident," an occasion involving not only the "national honour," and felt to involve it from one end of Great Britain to the other, but also a British interest of the most vital character in the safety of the high sea. The fate of the Russian Fleet and all the consequences which its destruction might have entailed were for some hours at the mercy of a popular excitement unparalleled in contemporary memory. Among the advocates of peace there was a clamour for arbitration which, however, was out-shouted by a counter-clamour for war. Before assessment of damages for an act of pure vandalism, there was a question of criminal and murderous assault on unoffending fishermen within a few miles of the British coast, in a part of the North Sea far removed from the natural highway between the Baltic and the mouth of the British Channel. Amid the prevailing excitement it was impossible to propose to leave it to the arbitration of an International Tribunal to decide whether the Russian admiral had acted rightly or wrongly. The Russian Government admitted that the injury done to the fishermen was unprovoked by those who were injured, but it merely sought to excuse the commission of the injury, and arbitration could only fix the amount of

the indemnity payable. Between it and war, however, there was the intermediate method of recourse to the new procedure provided by the Hague Peace Convention under the heading of "Commissions of Inquiry," which left it open to the British Government, after the facts had been ascertained and the question determined of where the responsibility lay and the degree of the blame, to exact the amends the situation required.

By the adoption of this course time was gained and public excitement was allayed.[1]

* * *

No one at the present day would assert that this conclusion of the incident was not more

[1] The reference of the difficulty which arose out of the Dogger-bank incident, to a Commission of Inquiry, was embodied in a Declaration exchanged (November 12–25, 1903) between the British and Russian Governments which ran as follows:

The Government of His Britannic Majesty and the Imperial Government of Russia having agreed to entrust to an International Commission of Inquiry, assembled in accordance with Articles IX.–XIV. of the Hague Convention of July 29 (17), 1899, for the pacific settlement of international conflicts, the care of elucidating by an impartial and conscientious examination the questions of fact relating to the incident which took place during the night of October 21–22 (8–9), 1904, in the North Sea, in the course of which the firing of cannon of the Russian Fleet occasioned the loss of a boat and the death of two persons belonging to a flotilla of British fishermen, and also damages to other boats of the said flotilla, and wounds to the crew of some of these boats. The undersigned, duly authorised to this effect, are agreed upon the following provisions:

Art. I.—The International Commission of Inquiry shall be composed of five members (Commissioners), two of whom shall be officers of high rank in the British and Imperial Russian Navies respectively. The French and United States Governments shall each be requested to choose one of their naval officers of high rank to be a member of the Commission. The fifth member shall be elected by the four above-mentioned members. In case the four Commissioners should not agree as to the choice of a fifth member

satisfactory than would have been a recourse to arms which might have involved us in complications far beyond the scope of the immediate issue. For the consolation of those who think that the chance of waging a successful war should never

of the Commission, His Majesty the Emperor of Austria, King of Hungary, shall be invited to make the appointment. Each of the two High Contracting Powers shall also appoint a jurist as assessor, with *voix consultative*, and an agent officially charged to take part in the work of the Commission.

ART. II.—The Commission shall make an inquiry into and draw up a report upon all the circumstances relating to the North Sea incident, and particularly upon the question of where the responsibility lies, and upon the degree of the blame affecting the nationals of the two High Contracting Powers or of other countries, in case their responsibility should be ascertained by the inquiry.

ART. III.—The Commission shall fix the details of the procedure which shall be followed by it for the accomplishment of the work with which it has been entrusted.

ART. IV.—The High Contracting Powers undertake to give to the International Commission of Inquiry, as far as possible, the means and facilities necessary to obtain a thorough knowledge and appreciation of the facts in question.

ART. V.—The Commission shall meet in Paris as soon as possible after the signature of this arrangement.

ART. VI.—The Commission shall present its report to the two High Contracting Powers, signed by all the members of the Commission.

ART. VII.—The Commission shall give all its decisions by a majority of the votes of the five Commissioners.

ART. VIII.—The High Contracting Powers undertake each to bear, *par réciprocité*, their respective expenses in the inquiry incurred prior to the meeting of the Commission. As regards the expenses incurred by the International Commission of Inquiry from the date of its meeting for the arrangement of its working and the necessary investigation, they will be defrayed in common by the two Governments.

In faith of which, etc.

(*Signatures.*)

The second Hague Conference dealt very fully with the procedure of Commissions of Inquiry, a procedure largely based on that which was formulated by Sir Edward Fry for the purposes of the Doggerbank inquiry.

See further on the subject, Barclay, *Thirty Years' Anglo-French Reminiscences*, pp. 253 *et seq.*

be allowed to slip and that one's neighbour's weakness is just such a chance, I may recall the fact that the battle of Mukden had been fought, and that there was nothing to prevent a Russo-Japanese peace being patched up which would have released the Russian forces then in a convenient situation to deal with some Russian ambitions with which British interests were in vital conflict.

* * *

The institution of International Commissions of Inquiry, we have seen, owed its origin to the project submitted by the Russian Government in 1899. The Article proposed in the project made reference to a Commission obligatory whenever differences arose between the Contracting States owing to divergencies of "appreciation" on matters of fact in which no question of honour and no essential interest was involved. This qualification was not regarded as a sufficiently wide loophole, and the further qualification was added that the obligation would only apply "as far as circumstances allow."

The Article therefore read as follows :

ART. IX.—In differences of an international nature involving neither honour nor essential interests and arising from a difference of opinion on points of fact, the Contracting Powers deem it expedient and desirable that the Parties, who have not been able to come to an agreement by means of diplomacy, as far as circumstances will allow, institute an

International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

The timid *rédaction* of this Article is evidence of the diplomatic anxiety which must have accompanied the birth of a novel diplomatic institution. After the introduction of the "circumstances permitting" condition, no one would have been surprised if the other qualification in the Article had been amended to read in the opposite sense, *i.e.*, involving either honour or an essential interest, in other words, had been made to apply to any cases whatsoever which a State might be ready to investigate.

* * *

The successful solution of the only case which, since the creation of the Hague Court, can be regarded as one involving the "national honour" by a pacific method, seems to indicate the direction further international evolution might take to bring about the application of pacific methods to the settlement of issues of which States are still reluctant to leave the ultimate decision to an independent Tribunal. This has been felt with special cogency in the United States, where Government, being more or less detached from European rivalries, is able to take a bolder attitude towards pacific methods than European Powers, from fear of being taxed with weakness,

dare assume. One of the first acts of Secretary Bryan, a warm champion of "pacifism," on the accession to power of President Wilson in March 1913, was, therefore, to take up the question of forwarding the general adoption of the pacific method which had proved itself the most effective of the different Hague devices for the preservation of peace. A few weeks later (April 24) he communicated to the representatives of the Powers at Washington what is now known as the "Wilson-Bryan Peace Plan." The plan was set out in the Note communicated to them in the following terms :

> The Parties hereto agree that all questions of whatever character and nature in dispute between them shall, when diplomatic efforts fail, be submitted to investigation and report to an International Commission (the composition to be agreed upon), and the Contracting Parties agree not to declare war or begin hostilities until such investigation is made and report submitted.
>
> The investigation shall be conducted as a matter of course upon the initiative of the Commission, without the formality of a request from either Party; the report shall be submitted within (time to be agreed upon) from date of the submission of the dispute, but the Parties hereto reserve the right to act independently on the subject-matter in dispute after the report is submitted.

In principle the "plan" was accepted by twenty-nine States, including Great Britain, France, Germany, Russia, Austria-Hungary and Italy. Among those which had not yet accepted it at the outbreak of the present war were Turkey

and Japan. With six Central and South American and one European State, viz., Holland, agreements in the sense of the above Declaration were promptly signed, an example which was afterwards followed by Great Britain.

* * *

Whether such an agreement will be signed after the war by others of the Great Powers which have accepted the principle of the reference to an Inquiry Commission or not, the terms of the plan are so courageously pacific that they deserve attention, if on no other ground. The agreement with Salvador which has served as the model for the others will be found *in extenso* appended to this chapter. If such an agreement were signed by the greater Powers, it would indeed be an achievement for the welfare of mankind of the first magnitude. I venture to suggest that it would be an enormous step forward if greater Powers bound themselves merely to accept examination by an independent and impartial committee of the matter at issue and of the conduct of the war, without undertaking to delay or suspend hostilities. For my own part, I think that even if this did not commend itself to the States in question, an unofficial committee of men of high intellectual and moral standing, created to investigate international grievances and give their opinion upon them, might have an influence

on public opinion of the greatest value to the preservation of peace.

NOTE TO CHAPTER VIII., THE WILSON-BRYAN PEACE PLAN

Model Treaty Contracted with the Republic of Salvador

The United States of America and the Republic of Salvador, being desirous to strengthen the bonds of amity that bind them together and also to advance the cause of general peace, have resolved to enter into a Treaty for that purpose and to that end have appointed as their plenipotentiaries :

The President of the United States, the Honourable William Jennings Bryan, Secretary of State ; and

The President of Salvador, Señor Don Federico Mejía, Envoy Extraordinary and Minister Plenipotentiary of Salvador to the United States ;

Who, after having communicated to each other their respective full powers, found to be in proper form, have agreed upon the following articles :

Article I

The High Contracting Parties agree that all disputes between them, of every nature whatsoever, which diplomacy shall fail to adjust, shall be submitted for investigation and report to an International Commission, to be constituted in the manner prescribed in the next succeeding Article ; and they agree not to declare war or begin hostilities during such investigation and report.

Article II

The International Commission shall be composed of five members, to be appointed as follows : One member shall be chosen from each country, by the Government thereof ; one

member shall be chosen by each Government from some third country; the fifth member shall be chosen by common agreement between the two Governments. The expenses of the Commission shall be paid by the two Governments in equal proportion.

The International Commission shall be appointed within four months after the exchange of the ratifications of this Treaty; and vacancies shall be filled according to the manner of the original appointment.

Article III

In case the High Contracting Parties shall have failed to adjust a dispute by diplomatic methods, they shall at once refer it to the International Commission for investigation and report. The International Commission may, however, act upon its own initiative, and in such case it shall notify both Governments and request their co-operation in the investigation.

The report of the International Commission shall be completed within one year after the date on which it shall declare its investigation to have begun, unless the High Contracting Parties shall extend the time by mutual agreement. The report shall be prepared in triplicate; one copy shall be presented to each Government, and the third retained by the Commission for its files.

The High Contracting Parties reserve the right to act independently on the subject-matter of the dispute after the report of the Commission shall have been submitted.

Article IV

Pending the investigation and report of the International Commission, the High Contracting Parties agree not to increase their military or naval programs, unless danger from a third Power should compel such increase, in which case the Party feeling itself menaced shall confidentially communicate the fact in writing to the other Contracting Party, whereupon the latter shall also be released from its obligation to maintain its military and naval *status quo*.

Article V

The present Treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof; and by the President of the Republic of Salvador, with the approval of the Congress thereof; and the ratifications shall be exchanged as soon as possible. It shall take effect immediately after the exchange of ratifications, and shall continue in force for a period of five years; and it shall thereafter remain in force until twelve months after one of the High Contracting Parties have given notice to the other of an intention to terminate it.

In witness whereof, etc.

CHAPTER IX

COMPULSORY TREATIES OF REFERENCE

In a previous chapter we have examined the methods by which States have sought, on the one hand, to preserve a loophole by which they may escape from the obligation to accept arbitration, and, on the other, by which they have endeavoured to provide for pacific settlement by Joint Commissions, if not by arbitration, of differences which they are reluctant to regard as arbitrable.

We have, in an intervening chapter, examined the cases which have been tried at the Hague with a view to ascertaining how in practice reference to the Hague Court works out.

In another intervening chapter we have seen that the Hague Court is likely to undergo changes corresponding to the variety of the cases which come before it, or are of a nature to be decided by it, and are at present withheld from it or might be referred to it under special reservations, etc. Lastly, we have examined the application of Commissions of Inquiry.

We are now in a position to consider com-

pulsory Treaties of Arbitration under which States deny themselves the luxury of war in certain or all cases, the scope within which such self-denial can safely be agreed to by larger and contiguous States, and the mode in which agreements for such a purpose have hitherto been, or seem capable of being, formulated.

* * *

The significance of arbitration Treaties depends on the importance in the community of nations of the States between which they are made.

When the Concert of Europe still existed, the Great Powers were Great Britain, France, Germany, Austria-Hungary, Italy, Russia and Turkey. The Concert was superseded by a revival of the Balance of Power between the Powers of the Alliance: Germany, Austria-Hungary and Italy; and those of the Entente: Great Britain, France and Russia. It is possible that this most unfortunate grouping of the States of Europe was merely the result of a passing phase of diplomatic ineptitude or indifference to questions vital to democratic progress and prosperity, and that the common interest of the Powers which have most to lose and the greatest physical force to withstand encroachment and aggression by any one of them will again assert itself after the present insensate storm has spent itself. The Great Powers in this case would be Great Britain, France, Germany,

(possibly still) Austria-Hungary, Italy, Russia, the United States and Japan. War between any of these States is necessarily not only a greater calamity to the world, but from their geographical relationship to one another it is a less remote contingency than war between minor States. Standing arbitration Treaties between them are, therefore, of greater moment than those with or between minor States.

* * *

From the above point of view, there are three kinds of Treaties of arbitration, viz., Treaties between Great Powers, Treaties between minor States and Treaties between Great Powers and minor States.

All three kinds exist in practice, and an examination of their nature and scope will show the direction in which experience is influencing progressive development.

* * *

Let us first deal with the Treaties which have been entered into between Great Powers.

Since the signing of the Anglo-French Treaty on October 14, 1903, the following Great Powers have signed Treaties: France and Italy, December 25, 1903; Great Britain and Italy, February 1, 1904; Great Britain and Germany, July 12, 1904; Great Britain and Austria-Hungary, January 11, 1905; United States and France, February 10,

1908; United States and Italy, March 28, 1908; Great Britain and United States, April 4, 1908; United States and Japan, May 5, 1908; United States and Austria-Hungary, January 15, 1909; Italy and Russia, October 27, 1910; Great Britain and United States, August 3, 1911; United States and France, August 3, 1911.

Recast in a more convenient form for comparison, these work out as follows:

Great Britain has signed compulsory Treaties with the following Great Powers: France (1903), Germany (1904), Italy (1904), Austria-Hungary (1905) and the United States (1908);

France with Great Britain (1903), Italy (1903) and the United States (1911);

Germany with Great Britain (1904);

Italy with France (1903), Great Britain (1904), the United States (1908) and Russia (1910);

Russia with Italy (1910);

Austria-Hungary with the United States (1909) and Great Britain (1910);

The United States with Great Britain (1908), Austria-Hungary (1909) and France (1908);

Japan with the United States (1908).

All of these (with the exception of the Treaties of 1911 between the United States and Great Britain and the United States and France) have been modelled on the Anglo-French agreement of October 14, 1903, that is, the Treaty which may be

said to be the minimum form of a standing compulsory Treaty.

The Anglo-French Treaty, in fact, confines the "compulsion" to differences of a judicial order and to the interpretation of existing Treaties between Contracting Parties, which it may not have been possible to settle by diplomacy, provided neither the vital interests nor the independence or honour of the two Contracting States, nor the interests of any State other than the two Contracting States, are involved. Moreover, it provides a safeguard against compulsion by stipulating that in each particular case the High Contracting Parties, before addressing themselves to the permanent Court of Arbitration, shall sign a special undertaking determining clearly the subject of dispute, the extent of the Arbitral Powers, and the periods to be observed in the constitution of the Arbitral Tribunal and the procedure. Thus they may disagree, even where obviously no question of vital interest or national honour is concerned, and escape from the operation of the Treaty.

As regards the Anglo-American and Anglo-French Treaties with which I have dealt in a previous chapter,[1] they are composite agreements which do not extend the scope of arbitration beyond that of the Anglo-French form, but pro-

[1] *See* p. 64, *et seq.*

vide additional methods to cover the cases which are excepted from the scope of that form.

It is seen that no Great Powers have yet ventured to enlarge the scope of arbitration as between them beyond such cases as, were they between private citizens, would by their nature be within the jurisdiction of the national Law Courts.

* * *

We come now to cases of Treaties between minor States, many of which have been much bolder than any Great Powers.

The first of these was that between Argentina and Chile signed on May 28, 1902, embracing all differences without distinction of method. Not only, however, was it the first of its kind, but it is the only one in existence between States which are contiguous and more or less equally balanced, and between which there were grave outstanding questions to settle. It was entered into, moreover, with a view to deliberately putting an end to war between them, and, in fact, for fifteen years these two States have set an example to the rest of the world in showing how neighbouring States can prosper under the benign influence of a pacific arrangement covering all possible cases of conflict.

Under this Treaty all difficulties without distinction are referred, on the ultimate failure of diplomacy, to the arbitration of the British Govern-

ment, and, in default of the British, to that of the Swiss Government.

The same two Republics simultaneously, to mark the sincerity of this pacific demonstration, entered into an agreement, the only one of the kind existing, for the reduction of their respective armaments. The memorandum of agreement on the subject set out that, in order to remove all cause of fear and distrust between the two countries, the two Governments had agreed not to take possession of the warships which they were having built abroad, and also, for the time being, not to make any other acquisitions of warships. They, furthermore, agreed to reduce their respective fleets, according to an arrangement establishing a reasonable proportion between them, this agreement to last for five years, unless the Party which wished to increase its armaments should give the other eighteen months' notice in advance.

In a similarly all-embracing but unratified Treaty of July 25, 1898, between Argentina and Italy, it had been provided that the Arbitral Tribunal should be composed of three judges, two appointed by the Parties, and an umpire chosen by the judges so appointed; in case of disagreement, the umpire to be appointed by an independent State, and, in case of disagreement as to the State, by the President of the Swiss Con-

federation, and, in his default, by the King of Sweden ; arbitrators not to be citizens of either Contracting Party nor residents in the territory of either Party.

In Europe, Holland and Denmark followed the example of Argentina and Chile in the adoption of a Treaty signed on February 12, 1904, submitting all matters without distinction to arbitration. There was, however, a very essential difference between them. While the Argentina-Chile Treaty placed the appointment of the arbitrator outside the power of the Parties themselves, this European Treaty contained no provision as to the appointment or mode of appointment of the arbitrator or arbitrators, and thus left a loophole for escape in case of need.

Other Treaties between minor States invariably except "national honour." As regards questions involving the national independence, also usually excepted, the Argentina-Chile Treaty draws the line only at questions "affecting the constitution of either State." This probably covers that of the national independence.

A standing Treaty between Argentina, Bolivia, St. Domingo, Guatemala, Salvador, Mexico, Paraguay, Peru and Uruguay, signed at Mexico on January 29, 1902, the first also of its kind, added a clause declaring that certain matters such as questions arising out of diplomatic privileges,

boundaries, navigation rights and the validity, interpretation and execution of Treaties, were not to be regarded as involving the national independence or honour, a device which has since been more or less followed in Europe, as will be seen below.

* * *

More important, again, than these Treaties between minor States are all-embracing agreements between Great Powers and minor States, because, where they exist, the minor State is protected against coercive methods such as "pacific blockades," the seizure of property or of a port belonging to the coerced State, etc. Such a one was the already cited treaty of September 18, 1907, signed, while the second Hague Conference was sitting, by Argentina and Italy, which declares subject to arbitration all matters without distinction, provided (as in the case of the Treaty between Argentina and Chile) they do not affect the constitutional laws of either country. This Treaty, by the way, added a new clause, providing that in any case in which the national Courts have jurisdiction, the Parties have the right to postpone the submission to arbitration till after the national Courts have delivered their final judgment upon it.

In 1909 (November 20) the Italian Government signed a similarly all-embracing Treaty with Holland, the appointment of the arbitrators,

in case the Parties should be unable to agree thereon, to lie with the King of Sweden.

Other Treaties between Great Powers and minor States retain the old formula of the exception of national honour and vital interests.

* * *

The clause contained in the Treaty among the nine American States, signed at Mexico (above referred to), specifically mentioning certain matters as excluded from the operation of the exception of "national honour," etc., has since been further developed.

In 1907 the inter-Parliamentary Union drafted a new clause based on this ingenious provision. In the draft prepared by that body the clause in question was retained, with the proviso that it could not be raised in a certain number of cases set out in a list to which the Parties could make such additions as experience dictated or warranted. This system has since then been adopted in a Treaty between France and Denmark (August 9, 1911).

* * *

It is seen that, down to the present time, the Great Powers have shown but little inclination to bind themselves, without a loophole for escape, to arbitration as a means of general settlement. The United States method of providing for the appointment of Joint Commissions to deal with non-arbitrable matters seems to be the most practical

effort which has yet been made to meet the difficulty of embracing in a Treaty all possible differences, that is to say, even those which have hitherto been regarded as lying outside the scope of such Treaties.

As regards Treaties confined to arbitration, the model which is most likely to be followed in the future is the elastic form adopted in that between France and Denmark of 1911. This, moreover, is the most likely of the existing forms to be adopted by the next Hague Conference as the common form, a subject on which the previous Conferences have failed to agree. With its list of matters subject to compulsory reference open to extension by any two States without committing any other State to more than it is prepared to accept, the more courageous States will be enabled to give arbitration a trial, where perhaps the more responsible States might hesitate while it is in a still more or less experimental stage.

Note

In the following drafts I have endeavoured to carry out the principles embodied in the Franco-Danish and Salisbury-Olney Treaties in their general application :

Draft of a General Treaty of Arbitration based on the Franco-Danish Treaty of August 9, 1911

The H.C.P., etc.

Whereas in Article 38 of the Convention of October 18,

1907, for the pacific settlement of international disputes, it is stated that :

> " in questions of a legal nature, and in the first place in questions relating to the interpretation or application of International Conventions, arbitration is recognised by the Contracting Powers to be the most efficacious and at the same time the most equitable means of settling disputes which have not been settled through diplomatic channels."

And that

> " it is, therefore, desirable that in disputes relating to the aforesaid questions, the Contracting Powers should, on the occasion arising, have recourse to arbitration so far as circumstances permit."

Declaring once more that such is their feeling and actuated by the desire to give greater practical effect to the above-stated principle,

Have drawn up the following terms of agreement :

1° The High Contracting Parties undertake to submit to the arbitration of the Hague Court, disputes

(*a*) arising out of the interpretation of clauses contained in all the agreements at present existing between them and which contain an arbitration clause ;

(*b*) arising out of the application of the said agreements either by reason of the failure to carry out or the imperfect carrying out of their clauses ;

(*c*) which are of a legal character, that is to say, susceptible of being settled by pecuniary indemnities.

2° The High Contracting Parties may, by notice given to the International Bureau created by Article XXII. of the Convention of July 29, 1899, jointly or severally make such additions as they may deem fit to the preceding Article.

The following Powers, etc. :

Undertake to submit to the arbitration of the Hague Court disputes which shall not have been settled through diplomatic channels and which relate to :

Fisheries,

Submarine cables,

Sanitary questions,
Frontier incidents,
Collisions between public ships and foreign private ships, etc.

3° Any matter belonging to one of the above categories is arbitrable,

(*a*) when two Contracting Parties are directly involved ;

(*b*) when one of the Parties is a Signatory State, and the other an individual or individuals belonging to the Signatory State which proposes arbitration.

4° In the case of a dispute which comes within the jurisdiction of the national judicial authorities as established by territorial laws, the Contracting Parties are entitled to refrain from submitting the dispute to arbitral procedure until the competent national jurisdiction shall have given its final decision.[1]

When a case has been thus decided, the defendant State shall not be entitled to raise any question of prescription so long as the case has not left diplomatic channels, and, in that case, prescription shall run only from the time when the private Party shall have received written notice that the Government by which it was represented has withdrawn from the case.

5° The undertakings contained in the present Treaty do not imply any liability to submit to the Hague Court disputes of a local nature that can best be settled by local arbitration. Nevertheless, a complete copy of all deeds and minutes of any arbitration held elsewhere than at the Hague Court shall be lodged in the archives of the said Court.

6° The appointment of the arbitrator or arbitrators, and the settling of all details of procedure, shall be made in accordance with Articles XLV. and LII. of the Convention of October 18, 1907, above mentioned.

7° In case of any dispute which a Signatory Power should consider not susceptible of being submitted to arbitration, the Signatory Powers undertake so far as possible to

[1] From Article VI. of the Italo-Dutch Treaty of November 30, 1909.

give effect to Article VIII. of the Convention of October 18, 1907, by each Party to the dispute appointing a mediator.

8° Any Signatory Power may withdraw from the present Treaty by giving to the above-mentioned International Bureau at the Hague notification to that effect one year in advance.

9° The International Bureau at the Hague is charged with the immediate transmission to the Signatory Powers of all communications which may be sent to it on the subject of the present Treaty.

In faith whereof, etc. etc.

Draft of a Treaty to include Vital Interests and National Honour, based on the Anglo-American Treaty of 1897 and the Hague Peace Provisions.

H.M. . . . etc. etc.

Animated by the desire to further extend the application of the principles agreed to in the Convention for the pacific settlement of international disputes of July 29, 1899, and to give to them the fullest practical effect which existing circumstances will permit ;

Trusting that, in case such further extension should prove satisfactory after a period of experience, it will be continued for a further period, and be followed by any further extension which may seem feasible ;

Desiring to conclude a Convention to this effect, have appointed as their Plenipotentiaries, etc. etc. etc., who have agreed as follows :

1. The High Contracting Parties undertake to submit to arbitration by the Hague Court all differences not affecting the internal laws or institutions or independence or territorial integrity of any High Contracting Party which may arise between them, and which may not have been settled by diplomacy, in accordance with the terms and conditions set out in the next following Articles.

2. For matters of a judicial character, or relating to the construction (interpretation) of Treaties, the Court shall be

composed in accordance with Article XXXII. of the said Convention.[1]

3. If in the judgment of one or other of the High Contracting Parties a question may appear to involve a vital interest or the national honour, or to be of too momentous a character to be submitted to decision under Article XXXII. of the said Convention—

(*a*) The Court shall be composed of judges appointed by the High Contracting Parties without an umpire, and in such number, not exceeding three each, as either Party may demand. The judges may be nationals of the State appointing them.

(*b*) The award will not finally close the dispute unless the judges, if two, are agreed, or, if four, one of two, or, if six, two of three of either side concur with those of the other side in their decision.

(*c*) Where a case is submitted to two judges only, and they do not agree, or to four who are equally divided, or to six who are equally divided, or of whom only one concurs with the other side, or where the judges take more than two views, or in any case whatsoever in which the majority provided for in subsection (*b*) is not obtained, the judges, nevertheless, give their judgments separately and in writing, in accordance with Article LII.[2] of the said Convention. These judgments

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[1] Subject to an alteration to reduce the number of arbitrators to be appointed under the 3rd section of Article XXXII., which is as follows: Article XXXII.—The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the Parties as they please, or chosen by them from the members of the Permanent Court of Arbitration established by the present Act. Failing the constitution of the Tribunal by direct agreement between the Parties, the following course shall be pursued: Each Party appoints two arbitrators, and these latter together choose an umpire. In case of equal voting, the choice of the umpire is entrusted to a third Power, selected by the Parties by common accord. If no agreement is arrived at on this subject, each Party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

[2] ART. LII.—The award given by a majority of votes is accompanied by a statement of reasons. It is drawn up in writing and signed by each member of the Tribunal. Those members who are in the minority may record their dissent when signing.

shall then be submitted to the mediation of a friendly Power to be chosen by the Parties [1]; in case of difference in such choice, to the President of the Swiss Confederation. The mediator shall appoint a jurist to examine and report on the judgments, and this report shall be submitted to the judges to enable them to reconsider their decisions. The jurist who shall have made the report shall be present at the sittings for such reconsideration, with power to deliberate but not to vote. The period for which the mandate conferred on the mediator shall be given shall be thirty days, as provided by Article VIII.[2] of the said Convention.

(*d*) If no agreement shall be arrived at after submission and discussion of the mediator's report, the International Bureau [3] at the Hague shall immediately on the close of the

[1] ART. III.—Independently of this recourse, the Signatory Powers recommend that one or more Powers, strangers to the dispute, should, on their own initiative and so far as circumstances may allow, offer their good offices or mediation to the States at variance. Powers, strangers to the dispute, have the right to offer good offices or mediation even during the course of hostilities. The exercise of this right can never be regarded by one or the other of the Parties in conflict as an unfriendly act.

[2] ART. VIII.—The Signatory Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form: In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to whom they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations. For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in conflict cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, who must use their best efforts to settle it. In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

[3] ART. XXII.—An International Bureau established at the Hague serves as record office for the Court. This Bureau is the channel for communication relative to the meetings of the Court. It has the custody of the archives, and conducts all the administrative business. The Signatory Powers undertake to communicate to the International Bureau at the Hague a duly certified copy of any conditions of arbitration arrived at between them, and of any award concerning

final sitting have the protocol of submission, the respective judgments, the report thereon, and the respective final decisions printed and made public in accordance with Article LIII.[1] of the said Convention.

4. The High Contracting Parties undertake to give every facility in their power to the judges and the mediator to ascertain the facts, and to do nothing pending arbitration or mediation which may in any way alter the situation of the matter at issue.

5. This Convention shall be binding on the High Contracting Parties for a period of ten years, and shall run on thereafter for further periods of ten years, unless notice of its termination be given by any Party, in which case it shall continue to be binding only as among the other Parties. Notice of one year shall be necessary to enable any Party to withdraw from it.

In faith whereof, etc. etc.

them delivered by special Tribunals. They undertake also to communicate to the Bureau the laws, regulations and documents eventually showing the execution of the awards given by the Court.

[1] ART. LIII.—The award is read out at a public meeting of the Tribunal, the agents and counsel of the Parties being present or duly summoned to attend.

CHAPTER X

THE DREAD ALTERNATIVE AND THE FUTURE

WHY, ask the optimists, cannot all States, forming as they do a sort of community for so many purposes, settle all their differences by judicial methods as the individuals composing them are wont to do? Why do they not follow the example of Argentina and Chile and establish a proportion between them for armaments and agree to adopt arbitration for the settlement of all differences to come? It was just to give effect to some such combined scheme that the Czar called the first of the Hague Conferences. At this first Conference the Russian Government submitted a proposal, on the one hand, to maintain the *status quo* in armaments, *i.e.*, not to add to them during some period to be fixed, and, on the other, as we have seen, to submit cases not involving "vital interests" or "national honour" to arbitration.

* * *

First, as regards the proposed generalisation of arbitration as a method of avoiding armed conflicts, States still hesitate to include in an arbitration

Treaty all differences without exception. The reason of this distrust is no further afield than that, where decisions between conflicting claims are involved, there are no rules except those of justice which arbitrators can ostensibly apply, and that these rules of justice fall short in many cases of international differences. Thus, by what rules could a case of preponderating interest devoid of juridical basis be decided, such, for instance, as where disorder in a neighbouring country is, or is believed or is alleged to be, a cause of disorder on one's own territory, a case alleged in most recent acts of aggression against weak native States in Asia? The same difficulty arises where a claim is made to territory belonging to a country which has no surplus population with which to people it. The same absence of juridical basis excluded arbitration from recent controversies between Germany and France in Morocco, between Germany and Portugal in Africa, between Japan and Russia in Western Siberia, and may arise in other well-known cases. It arises where rectifications of frontier with a view to complying with a reasonable geographical situation are concerned, as between France and Germany in Europe, or where there are racial considerations, such as between Italy and Austria-Hungary in connection with the Italian population of parts of that Empire. More recent instances are those of the Turco-Italian and Balkan

Wars, which arose out of demands none of which could be decided in accordance with any legal principles applicable to conflicting rights as such.

The question out of which the present conflict arose is different. The Serbian reply to the Austro-Hungarian ultimatum reserved a point which might have been solved by arbitration, or, at any rate, was of such a character that the British Foreign Secretary, Sir Edward Grey, suggested arbitration as a method of dealing with it. That the proposal was not accepted is a fact the significance of which will no doubt appear when all the facts are known. It is beyond the scope of this book to do more than record this deliberate refusal to agree to arbitration where war was the only alternative.

* * *

The negotiators of the Treaty between Argentina and Chile evidently had the difficulty of settlement by arbitration of all questions in mind, when they inserted in it a provision (Art. 8) prescribing that the arbitrator shall decide according to the *principles of International Law unless the terms of submission authorised him to act as "amiable compositeur," or implied the application of special rules*. They evidently thought that the two States might have to authorise the arbitrator to take expediency or other extra-judicial considerations into account.

This example has never been followed, and as between the United States and Great Britain and the United States and France, as we have seen, the system adopted for cases of the character in question is a conciliatory method as distinguished from arbitration.

* * *

States are, thus, left confronted for a class of cases which are just the kind most difficult to settle amicably without any method of adjustment, except conciliation between themselves or the mediation of independent Powers. And, as Foreign Offices frankly admit, that it is the absence of considerations of justice in certain cases which prevents judicial solution, international distrust has always been painfully present in the policy of practically all States having rival or even only parallel interests. Out of this distrust sprang a corresponding rivalry of armaments. Hence the difficulty of restricting them, and therefore the paradox of there having been, so far from any tendency to adjust them in inverse proportion to the development of methods for dispensing with need of them, that their increase has outraced all efforts to avoid recourse to force and violence.

* * *

Many persons found some sort of consolation for this fatal paradox in ascribing to war a virtue

in itself. This was the view of the famous Count von Moltke, who, when approached by a delegation of the Institute of International Law, headed by Professor Bluntschli, declared that the world would be ugly without war!

The German philosopher Nietzsche has said perhaps the most eloquent thing ever said in its favour. "It is mere illusion and pretty sentiment," he said, "to expect much (even anything at all) from mankind if it forgets how to make war. As yet no means are known which call so much into action as a great war: that rough energy born of the camp, that deep impersonality born of hatred, that conscience born of murder and cold-bloodedness, that fervour born of effort in the annihilation of the enemy, that proud indifference to loss, to one's own existence, to that of one's fellows, that earthquake-like soul-shaking which a people needs when it is losing its vitality." [1]

Whether this is pessimism or optimism, it reminds one singularly of Voltaire's Pangloss, and we might on similar grounds find consolation for the loss of the fifteen hundred victims of the *Titanic* disaster, for the destruction wrought by the earthquakes of California, Martinique and Sicily, and be encouraged to engineer railway

[1] *Menschliches-Allzumenschliches*, No. 477.

accidents and mining explosions as a matter of policy to keep national vitality from degenerating!

It is pleasant to contrast this somewhat neurotic joy of Nietzsche with the matter-of-fact reflections of the late W. E. H. Lecky: "War," he says, "is not, and never can be, a mere passionless discharge of a painful duty. It is in its essence, and it is a main condition of its success, to kindle into fierce exercise among great masses of men the destructive and combative passions—passions as fierce and as malevolent as that with which the hounds hunt the fox to its death or the tiger springs upon its prey. Destruction is one of its chief ends. Deception is one of its chief means, and one of the great arts of skilful generalship is to deceive in order to destroy. Whatever other elements may mingle with and dignify war, this at least is never absent; and however reluctantly men may enter into war, however conscientiously they may endeavour to avoid it, they must know that when the scene of carnage has once opened, these things must be not only accepted and condoned, but stimulated, encouraged and applauded. It would be difficult to conceive a disposition more remote from the morals of ordinary life, not to speak of Christian ideals, than that with which the soldiers, animated with the fire and passion that lead to victory, rush forward to bayonet the foe. . . . It is allow-

able to deceive an enemy by fabricated dispatches purporting to come from his own side, by tampering with telegraph messages, by spreading false intelligence in newspapers, by sending pretended spies and deserters to give him untrue reports of the numbers and movements of the troops, by employing false signals to lure him into an ambuscade." [1]

* * *

Nor can one read accounts by eye-witnesses of recent warfare without being struck by the small number of the exceptions to its unqualified bestiality. It has been suggested that the nervous tension among combatants and even among non-combatants may produce a higher state of mental endowment in subsequent generations. Such an abnormal consequence would need the fullest substantiation to obtain any measure of credence. On the other hand, if progressive development by survival of the fittest has any sense at all, war among nations which recruit their armies from the physically fittest of their young men must favour the survival of the least fit. It is even very doubtful whether the unwounded survivors themselves benefit either morally or physically by actual warfare. There is at any rate no evidence of any such effect.

Some years ago Field-Marshal von Hahnke,

[1] *Map of Life*, 1902, pp. 92–7.

at some function in Berlin, had me presented to him. He said he wanted to tell me that I was mistaken in having implied in some speech that the German war-party was mainly recruited from German officers. "If an officer professes to long for war, beware of him," he said; "he must be as insane as an engine-driver who longs for a railway accident! When the accident of war occurs, officers and men do their duty manfully and willingly, but, at the best, war is a fiendish thing, and those who have seen it can never wish to see it again." He had taken part in three wars and had held all the highest offices in the service of the monarchs he served.

* * *

Then again, as regards those who admit the stupidity of war but invoke the maxim, *si vis pacem para bellum*, I fail to understand how peace can be preserved best by threatening each other with war, by rivalry in the increase of war expenditure, by exciting public opinion about the evil intentions of neighbouring States and keeping whole nations under arms, ready at a moment's notice to fly at each other's throats. *Reductio ad absurdum* as this reads, whenever we see the maxim quoted, this is the situation in support of which it is appealed to. It never had a more significant answer than the present war, which was the outcome of a race in armaments and probably of the

belief of one, if not more, of the racing Powers that preparedness for war had no sense except that of waging it as soon as the circumstances were favourable. And yet, I repeat, in spite of all the arguments against war and against rivalry in outdoing each other in preparation for it, on the one hand, and, on the other, of all the efforts which were being made by entering into standing Treaties of Arbitration and by creating a peace jurisdiction to dispense with the arbitrament of brute force, wars, instead of becoming less frequent became more so, and armaments, instead of abating, increased in spite of the ever-broadening area of intelligence and knowledge among the different civilised peoples of the world.

* * *

Other reasons besides distrust among States of each other's intentions may, however, account for this anomaly of contemporary statecraft.

When a fleet is on the move, its pace is dictated by the speed of the slowest of the ships composing it. Is not progress in the intercommunion of States, in the same way, to some extent dictated by the pace of the slowest of them? Assuming that the most advanced State is that in which self-government and popular responsibility have reached their highest effective development, the slowest would be that State in which autocratic government has parted least with its privileges.

As autocracies generally rely on the support of a military caste and use war as a political method of self-preservation, it is necessarily autocracies which play the part of the slower vessel. These autocracies, while they obstruct the growth of popular government at home, consciously or unconsciously, in a corresponding proportion force the pace of the growth of armaments in other countries which are forced for self-defence to be prepared against possible aggression by States whose action may be dictated by domestic rather than foreign considerations. This was the case in Europe. A State whose liberal institutions had not yet reached a determining influence in decisions for or against war, which possessed an immense army and a population capable of increasing it beyond the capabilities of any other European country, forced her Western neighbour, which had a population considerably smaller but socially and politically more highly developed, and a Government not antagonistic to the progress of liberal ideas, to take into consideration the possibility of war for other than national necessities and to make up for its more contracted resources in population by the higher development and quality of its methods. This again affected another neighbour farther West with a still less rapidly growing population and still more advanced political institutions, and ought, logically,

to have led it to resort in a still higher degree to mechanical methods for the compensation of less favourable natural conditions !

* * *

Yet, it was the ex-Czar who called the first Hague Conference for the deliberate purpose of relaxing this fatal growth of armaments and coming to some understanding which would render a diminution of the then existing ruinous war expenditure possible.

No more eloquent or convincing statement of the folly of the situation in 1898 was ever compressed into so short a space than the communication on behalf of the Czar to the Foreign Powers concerning this proposal. In it he said :

> Being convinced that this high aim agrees with the most essential interests and legitimate aspirations of all the Powers, the Imperial Government considers the present moment a very favourable one for seeking, through international discussion, the most effective means of assuring to all peoples the blessings of real and lasting peace, and above all, of limiting the progressive development of existing armaments. . . . The ever-increasing financial burdens strike at the root of public prosperity. The physical and intellectual forces of the people, labour and capital are diverted for the greater part from their natural application and wasted unproductively. Hundreds of millions are spent in acquiring terrible engines of destruction, which are regarded to-day as the latest inventions of science, but are destined to-morrow to be rendered obsolete by some new discovery. National culture, economic progress and the production of wealth are either paralysed or developed in a wrong direction. Therefore the more the armaments of each Power increase, the less

they answer to the objects aimed at by the Governments. Economic disturbances are caused in great measure by this system of excessive armaments; and the constant danger involved in this accumulation of war material renders the armed peace of to-day a crushing burden more and more difficult for nations to bear. It consequently seems evident that if this situation be prolonged it will inevitably result in the very disaster it sought to avoid, and the thought of the horrors of which makes every humane mind shudder. It is the supreme duty, therefore, of all States to place some limit on these increasing armaments, and find some means of averting the calamities which threaten the whole world." [1]

* * *

Two Peace Conferences have been held at the Hague, but the main object for which the Czar initiated them has on both occasions been negatived. On the later occasion (1907) this was done by consent of the leading Powers to avoid a break-up of the Conference and the wrecking

[1] Incidentally I call the reader's attention to the statement in this document, that the Czar was entirely in favour of the cause of limitation of armaments. It is believed to be a fact that the proposal of the Conference was the outcome of the Czar's personal attachment to peace, and the fact that war five years later broke out between Russia and Japan does not belie this, as the following incident bears witness:

At a dinner at which I was present at New York in January 1904, a month before the outbreak of the war, a telegram was received from Washington to say that a cable had been received from the American Ambassador in St. Petersburg, saying that the Czar had sent a conciliatory message in reply to the Japanese Note. I remember the words of the telegram—they were imprinted in everybody's mind —"There will be no war." What became of the message?

Different explanations have been given of why events did not bear out the Czar's personal assurance to the American Ambassador. If, in fact, the Czar's conciliatory message did not reach Japan, no explanation ever given has cast any reflection on the Czar's personal good faith.

of the valuable results in other matters achieved by it.

And in fact after 1899 armaments steadily increased in the proportion for Russia herself of over 50 per cent., for Germany of as much, and for France of about 30 to 40 per cent. Germany and Russia in war expenditure at the outbreak of the war just about balanced each other. France and Russia combined, however, spent some 30 per cent. more on armaments than Germany and Austria-Hungary combined, and, even adding Italy, the whole Triple Alliance spent on armaments considerably less than the Dual Alliance. The proportion of expenditure was regarded, we now know wrongly, as a closer approximation to the relative strength of nations than numerical assessments, however constituted and subdivided.

In view of this situation, it is difficult to see in what way a conference of the Powers in general could have dealt with the proportion of armaments existing between the Triple and the Dual Alliances. The question of the progressive reduction of armaments is obviously not one for the consideration of States in general, but is necessarily inherent to the relations of contiguous States with one another.

* * *

If, in spite of the Czar's proposals, wars have been exceptionally frequent since 1899, this is no

proof of the folly of the effort. The suggestion of a proportionate adjustment cannot fail at the conclusion of the present war to receive consideration at the hands of the Powers concerned, though this may be mainly because the cost will by far exceed the limit of the taxation available to meet it.

Meanwhile, the cause of peace can obviously be best advanced by the revival of such a European Concert as will ensure co-operation among States on a similar level of civilisation, for which war entails similarly ruinous consequences and the pacific settlement of disputes a similarly material gain. And in any case the Czar's fateful words of 1898 as to the consequences of competition in armaments have been so amply realised, that it will be difficult to convince an age chastened by experience that development of pacific methods in the settlement of international difficulties is not the highest interest of mankind.

APPENDICES

I

HAGUE CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES (WITH DIFFERENCES BETWEEN THE TEXTS OF 1899 AND 1907)

(*The passages between square brackets are the parts of the Convention of* 1899 *which have been suppressed. Those in italics are the additions and alterations made by the Convention of* 1907)

(*Names of High Contracting Parties*)

ANIMATED by a strong desire to concert for the maintenance of general peace ;

Resolved to second by their best efforts the friendly settlement of international disputes ;

Recognising the solidarity which unites the members of the society of civilised nations ;

Desirous of extending the empire of law, and of strengthening the appreciation of international justice ;

Convinced that the permanent institution of a Court of Arbitration, accessible to all, in the midst of the independent Powers, will contribute effectively to this result ;

Having regard to the advantages attending the general and regular organisation of arbitral procedure ;

Sharing the opinion of the august Initiator of the International Peace Conference that it is expedient to record in an International agreement the principles of equity and right

on which are based the security of States and the welfare of peoples ;

Desirous for this purpose of better assuring the practical working of Commissions of Inquiry and Courts of Arbitration and to facilitate recourse to arbitration when matters in variance are concerned which can be dealt with by a summary procedure ;

Have thought it necessary to revise on certain points and to complete the work of the first Peace Conference for the pacific settlement of international disputes.

[Being desirous of concluding a Convention to this effect, have appointed as their Plenipotentiaries : etc. etc. etc.]

The High Contracting Powers have resolved to enter into a new Convention for this purpose, and have named as their Plenipotentiaries.

(*Names and Description of the Plenipotentiaries*)

Who, after [communication of] *having deposited* their full powers, found in good and due form, have agreed [on the following provisions] *as follows* :

Title I.—On the Maintenance of General Peace

Art. I.—With a view to obviating, as far as possible, recourse to force in the relations between States, the [Signatory] *Contracting* Powers agree to use their best efforts to ensure the pacific settlement of international differences.

Title II.—On Good Offices and Mediation

Art. II.—In case of serious disagreement or conflict, before an appeal to arms, the [Signatory] *Contracting* Powers agree to have recourse, as far as circumstances allow, to the good offices or mediation of one or more friendly Powers.

Art. III.—Independently of this recourse, the [Signatory] *Contracting* Powers consider it expedient *and desirable* that one or more Powers, strangers to the dispute, should, on their own initiative, and as far as circumstances may allow, offer their good offices or mediation to the States at variance.

Powers, strangers to the dispute, have the right to offer good offices or mediation, even during the course of hostilities.

The exercise of this right can never be regarded by one or the other of the Parties in conflict as an unfriendly act.

ART. IV.—The part of the mediator consists in reconciling the opposing claims and appeasing the feelings of resentment which may have arisen between the States at variance.

ART. V.—The functions of the mediator are at an end when once it is declared, either by one of the Parties to the dispute, or by the mediator himself, that the means of reconciliation proposed by him are not accepted.

ART. VI.—Good offices and mediation, either at the request of the Parties at variance, or on the initiative of Powers, strangers to the dispute, have exclusively the character of advice, and never have binding force.

ART. VII.—The acceptance of mediation cannot, unless there be an agreement to the contrary, have the effect of interrupting, delaying or hindering mobilisation or other measures of preparation for war.

If mediation occurs after the commencement of hostilities, it causes no interruption to the military operations in progress, unless there be an agreement to the contrary.

ART. VIII.—The [Signatory] *Contracting* Powers are agreed in recommending the application, when circumstances allow, of special mediation in the following form :

In case of a serious difference endangering the peace, the States at variance choose respectively a Power, to whom they entrust the mission of entering into direct communication with the Power chosen on the other side, with the object of preventing the rupture of pacific relations.

For the period of this mandate, the term of which, unless otherwise stipulated, cannot exceed thirty days, the States in conflict cease from all direct communication on the subject of the dispute, which is regarded as referred exclusively to the mediating Powers, who must use their best efforts to settle it.

In case of a definite rupture of pacific relations, these Powers are charged with the joint task of taking advantage of any opportunity to restore peace.

TITLE III.—ON INTERNATIONAL COMMISSIONS OF INQUIRY

ART. IX.—In differences of an international nature involving neither honour nor vital interests, and arising from a difference of opinion on points of fact, the [Signatory] *Contracting* Powers recommend that the Parties, who have not been able to come to an agreement by means of diplomacy, should, as far as circumstances allow, institute an International Commission of Inquiry, to facilitate a solution of these differences by elucidating the facts by means of an impartial and conscientious investigation.

[ART. X.—The International Commissions of Inquiry are constituted by special agreement between the Parties in conflict.

The Convention for an inquiry defines the facts to be examined and the extent of the Commissioners' powers.

It settles the procedure.

On the inquiry both sides must be heard.

The form and the periods to be observed, if not stated in the Inquiry Convention, are decided by the Commission itself.]

[ART. XI.—The International Commissions of Inquiry are formed, unless otherwise stipulated, in the manner fixed by Article XXXII. of the present Convention.]

[ART. XII.—The Powers in dispute engage to supply the International Commission of Inquiry, as fully as they may think possible, with all means and facilities necessary to enable it to be completely acquainted with, and to accurately understand, the facts in question.]

[ART. XIII.—The International Commission of Inquiry communicates its report to the conflicting Powers, signed by all the members of the Commission.]

[ART. XIV.—The Report of the International Commission of Inquiry is limited to a statement of facts, and has in no way the character of an Arbitral Award. It leaves the conflicting Powers entire freedom as to the effect to be given to this statement.]

ART. X.—*International Commissions of Inquiry are constituted by a special Convention between the Parties in conflict.*

The Convention of Inquiry states precisely the facts to be examined; it determines the mode of and period for the constitution of the Commission, and the extent of the powers of the commissioners.

It also states, should the case arise, the place where the Commission shall sit, and the power to change the place, the language which it shall use, and those the use of which shall be authorised, as well as the date at which each Party shall lodge its statement of facts and, in general, all the conditions to which the Parties have agreed.

If the Parties consider it necessary to name assessors, the Convention of Inquiry determines how they shall be chosen and the extent of their powers.

ART. XI.—*If the Convention of Inquiry has not appointed the place of meeting of the Commission, the latter shall sit at the Hague.*

Once the place has been fixed, it cannot be changed by the Commission without the consent of the Parties.

If the Convention of Inquiry has not determined what languages are to be employed, this shall be determined by the Commission.

ART. XII.—*Unless there is a stipulation to the contrary, the Commissions of Inquiry shall be formed as specified in Articles XLV. and LVII. of this Convention.*

ART. XIII.—*In case of death, resignation or prevention from any cause whatsoever, of one of the commissioners, or contingently of one of the assessors, he shall be replaced in the same manner as he was appointed.*

ART. XIV.—*The Parties have the right to appoint special agents in connection with the Commission of Inquiry, whose duty it is to represent them and serve as intermediaries between them and the Commission.*

They are, in addition, entitled to instruct counsel or advocates appointed by the Parties, to state and argue the case before the Commission.

ART. XV.—*The International Bureau of the permanent Court of Arbitration shall serve as a Registry for the Commissions which shall sit at the Hague, and shall place its offices and*

organisation at the disposal of the Contracting Parties for the operations of the Commission of Inquiry.

ART. XVI.—*If the Commission sits elsewhere than at the Hague, it appoints a General Secretary whose offices shall serve as a Registry.*

The Registry has charge, subject to the President's authority, of the material organisation of the sittings of the Commission, the drawing up of the minutes, and during the inquiry the keeping of the archives which shall afterwards be handed over to the International Bureau at the Hague.

ART. XVII.—*In order to facilitate the institution and the working of the Commissions of Inquiry, the Contracting Powers recommend the following rules which shall be applicable to the procedure of inquiry, in so far as the Parties do not adopt other rules.*

ART. XVIII.—*The Commission shall regulate the details of procedure which have not been provided for by the special Convention of Inquiry, or in the present Convention, and shall fulfil all the formalities relating to the taking of evidence.*

ART. XIX.—*The inquiry shall take place in the presence of both Parties.*

On dates fixed beforehand, each Party shall communicate to the Commission and to the other Party the statements of fact, if necessary, and in all cases the records, papers, and documents which it considers useful for ascertaining the facts, as well as the list of witnesses and experts it desires to be heard.

ART. XX.—*The Commission may, with the consent of the Parties, temporarily move to the spot where it considers it useful to resort to this method of obtaining information, or it may delegate one or more of its members to go there. It must obtain the authorisation of the State on whose territory it proposes to obtain such information.*

ART. XXI.—*All verifications on the spot and visits to places shall be made in the presence of the agents and counsel of the Parties or after they have been duly cited.*

ART. XXII.—*The Commission has the right to require from one or the other Party such explanations or information as it may deem useful.*

ART. XXIII.—*The Parties undertake to furnish the Commission of Inquiry, to the fullest extent they consider possible, with all necessary means and facilities to obtain complete knowledge and an exact appreciation of the facts at issue.*

They undertake to make use of the means at their disposal in accordance with their internal legislation, to ensure the attendance of witnesses or experts, on their territory, and cited to appear before the Commission.

If such witnesses and experts cannot appear before the Commission, they will have their evidence taken before their own proper authorities.

ART. XXIV.—*For the purpose of any notifications which the Commission may have to make on the territory of a third Contracting Power, the Commission shall address itself directly to the Government of that Power. The same applies where evidence has to be taken on the spot.*

Requests addressed for this purpose shall be carried out in accordance with the methods provided by the domestic legislation of the Power applied to. They can only be refused if this Power consider them of a nature injurious to its sovereignty or security.

The Commission shall also at all times have Power of recourse to the intermediary of the Power on whose territory it may be holding its sittings.

ART. XXV.—*Witnesses and experts are cited on application by the Parties, or ex officio by the Commission, and, in all cases, through the intermediary of the Government of the State on whose territory they may be.*

The witnesses are heard one after the other and separately, in the presence of the agents and counsel, and in the order fixed by the Commission.

ART. XXVI.—*The interrogation of witnesses is conducted by the President.*

The members of the Commission may, nevertheless, put to each witness such questions as they may think proper, to explain or complete his deposition, or to obtain information on anything relating to the witness within the necessary limits for the ascertaining of the truth.

The agents and counsel of the Parties may not interrupt

a witness in his deposition, nor address any question to him directly, but may request the President to put to the witness such complementary questions as they may deem necessary.

ART. XXVII.—*The witness must make his depositions without being allowed to read from any draft. He may, however, be authorised by the President to make use of notes or documents if the nature of the facts deposed to necessitate their use.*

ART. XXVIII.—*A minute of the deposition of the witness is drawn up during the sitting, and is read over to the witness. The witness may make such alterations and additions as he may think fit, and they shall be added at the foot of his deposition.*

When the whole of the deposition is read over to the witness, he is requested to sign it.

ART. XXIX.—*The agents are authorised, during or after the inquiry, to submit in writing to the Commission and to the other Party, such statements, requisitions or summaries of fact, as they may deem fit for the ascertaining of the truth.*

ART. XXX.—*The deliberations of the Commission shall take place within closed doors and shall be secret.*

Every decision shall be by the majority of the members of the Commission.

The refusal of a member to take part in the voting shall be mentioned in the minute.

ART. XXXI.—*The sittings of the Commission are only public, and the minutes and documents of the inquiry are only made public by virtue of a decision of the Commission, taken with the consent of the Parties.*

ART. XXXII.—*The Parties having submitted all explanation and evidence, all witnesses having been heard, the President pronounces the inquiry closed, and the Commission adjourns to deliberate and to draw up its report.*

ART. XXXIII.—*The report is signed by all the members of the Commission.*

If any member refuses to sign it, mention is made thereof; the report, nevertheless, remains valid.

ART. XXXIV.—*The report of the Commission is read at a public sitting, the agents and counsel of the Parties being present or duly cited.*

A copy of the report is forwarded to each Party.

ART. XXXV.—*The report of the Commission, limited to an ascertaining of the facts, has not the character of an arbitral award. It allows the Parties full liberty in respect of giving effect to such ascertainment.*

ART. XXXVI.—*Each Party shall bear its own costs and an equal share of the expenses of the Commission.*

TITLE IV.—ON INTERNATIONAL ARBITRATION

Chapter I.—*On the System of Arbitration*

ART. [XV.] XXXVII.—International arbitration has for its object the settlement of differences between States by judges of their own choice, and on the basis of respect for law. *Recourse to arbitration implies an undertaking to submit in good faith to the Award.*

ART. [XVI.] XXXVIII.—In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognised by the [Signatory] *Contracting* Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle.

ART. [XVII.] XXXIX.—The Arbitration Convention is concluded for questions already existing or for questions which may arise eventually.

It may embrace any dispute, or only disputes of a certain category.

[ART. XVIII.—The Arbitration Convention implies the engagement to submit loyally to the Award.]

ART. [XIX.] XL.—Independently of general or private Treaties expressly stipulated recourse to arbitration as obligatory on the [Signatory] *Contracting* Powers, these Powers reserve to themselves the right of concluding [either before the ratification of the present Act or later] new Agreements, general or private, with a view to extending obligatory arbitration to all cases which they may consider it possible to submit to it.

Chapter II.—*On the Permanent Court of Arbitration*

ART. [XX.] XLI.—With the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy, the [Signatory] *Contracting* Powers undertake to [organise a] *maintain as established by the first Peace Conference, the* permanent Court of Arbitration, accessible at all times, and operating, unless otherwise stipulated by the Parties, in accordance with the Rules of Procedure inserted in the present Convention.

ART. [XXI.] XLII.—The permanent Court [shall be] *is* competent for all arbitration cases, unless the Parties agree to institute a special Tribunal.

ART. [XXII.] XLIII.—*The permanent Court has its seat at the Hague.*

An International Bureau [established at the Hague] serves as record office for the Court.

[This Bureau] *It* is the channel for communications relative to the meetings of the Court.

It has the custody of the archives, and conducts all the administrative business.

The [Signatory] *Contracting* Powers undertake to communicate to the International Bureau [at the Hague], *as soon as possible*, a duly certified copy of any conditions of arbitration arrived at between them, and of any award concerning them delivered by special Tribunals.

They undertake also to communicate to the Bureau the Laws, Regulations and documents eventually showing the execution of the awards given by the Court.

ART. [XXIII.] XLIV.—[Within the three months following ratification of the present Act], Each [Signatory] *Contracting* Power [shall] select*s* four persons at the most, of known competency in questions of international law, of the highest moral reputation, and disposed to accept the duties of arbitrators.

The persons thus selected [shall be] *are* inscribed, as members of the Court, in a list which shall be notified by the Bureau to all the Signatory Powers.

Any alteration in the list of arbitrators is brought by the Bureau to the knowledge of the [Signatory] *Contracting* Powers.

Two or more Powers may agree on the selection in common of one or more members.

The same person can be selected by different Powers.

The members of the Court are appointed for a term of six years. Their appointments can be renewed.

In case of the death or retirement of a member of the Court, his place shall be filled in accordance with the method of his appointment, *and for a further period of six years.*

ART. [XXIV.] XLV.—When the [Signatory] *Contracting* Powers desire to have recourse to the permanent Court for the settlement of a difference that has arisen between them, the arbitrators called upon to form the competent Tribunal to decide this difference must be chosen from the general list of members of the Court.

Failing [the direct] agreement of the Parties on the composition of the Arbitration Tribunal the following course shall be pursued :

Each Party appoints two arbitrators [and these], *of whom one only can be of its nationality or selected from those nominated by them as members of the permanent Court. These arbitrators* together choose an umpire.

If the votes are equal, the choice of the umpire is entrusted to a third Power, selected by the Parties by common accord.

If an agreement is not arrived at on this subject, each Party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.

[The Tribunal being thus composed, the Parties notify to the Bureau their determination to have recourse to the Court and the names of the arbitrators.

The Tribunal of Arbitration assembles on the date fixed by the Parties.

The members of the Court, in the discharge of their duties and out of their own country, enjoy diplomatic privileges and immunities.]

If, within a period of two months, these two Powers have not come to an agreement, each of them submits two candidates taken from the list of members of the permanent Court, apart from the members selected by the Parties and not being nationals of any of these Parties. The umpire shall be selected from the candidates thus submitted by drawing of lots.

[ART. XXV.—The Tribunal of Arbitration has its ordinary seat at the Hague.

Except in cases of necessity, the place of session can only be altered by the Tribunal with the assent of the Parties.]

[ART. XXVI.—The International Bureau at the Hague is authorised to place its premises and its staff at the disposal of the Signatory Powers for the operations of any special Board of Arbitration.

The jurisdiction of the permanent Court may, within the conditions laid down in the Regulations, be extended to disputes between non-Signatory Powers, or between Signatory Powers and non-Signatory Powers, if the Parties are agreed on recourse to this Tribunal.]

ART. XLVI.—*As soon as the Tribunal is constituted, the Parties shall notify to the Bureau their decision to apply to the Court, the text of their "compromis" and the names of the arbitrators.*

The Bureau communicates, without delay, to each arbitrator the "compromis" and the names of the other members of the Tribunal.

The Tribunal sits at the date fixed by the Parties. The Bureau provides for its installation.

The members of the Tribunal, in the exercise of their functions and outside their own country, enjoy diplomatic privileges and immunities.

ART. XLVII.[1]—*The Bureau is authorised to place its premises and its organisation at the disposal of the Contracting Powers for the purposes of any special proceedings in arbitration.*

[1] *See* Article XXVI., of which this takes the place without change of sense.

The jurisdiction of the permanent Court may be extended, under conditions provided for by the rules, to differences existing between non-Contracting Powers or between Contracting Powers and non-Contracting Powers, if the Parties are agreed to accept this jurisdiction.

ART. [XXVII.] XLVIII.—The [Signatory] *Contracting* Powers consider it their duty, if a serious dispute threatens to break out between two or more of them, to remind these latter that the permanent Court is open to them.

Consequently, they declare that the fact of reminding the conflicting Parties of the provisions of the present Convention, and the advice given to them, in the highest interests of peace, to have recourse to the permanent Court, can only be regarded as friendly actions.

In case of dispute between two Powers, one of them may always address a note to the International Bureau containing its declaration that it is prepared to submit the difference to arbitration.

The Bureau shall at once bring the declaration to the knowledge of the other Power.

ART. [XXVIII.] XLIX.—[A] *The* Permanent Administrative Council composed of the Diplomatic Representatives of the [Signatory] *Contracting* Powers accredited to the Hague, and of the Netherland Minister for Foreign Affairs, who [will] acts as President [shall be instituted in this town as soon as possible after the ratification of the present Act by at least nine Powers] *under the direction and control of the International Bureau.*

This Council will be charged with the establishment and organisation of the International Bureau, which will be under its direction and control.

[It will notify to the Powers the constitution of the Court and will provide for its installation.]

[It will] *This Council* settles its Rules of Procedure and all other necessary Regulations.

It [will] decides all questions of administration which may arise with regard to the operations of the Court.

It [will have] *has* entire control over the appointment,

suspension or dismissal of the officials and employés of the Bureau.

It [will] fix*es* the payments and salaries, and controls the general expenditure.

At meetings duly summoned the presence of [five] *nine* members is sufficient to render valid the discussions of the Council. The decisions are taken by a majority of votes.

The Council communicates to the [Signatory] *Contracting* Powers without delay the Regulations adopted by it. It [furnishes] *submits to* them [with] an annual Report on the labours of the Court, the working of the Administration, and the expenses.

The report also contains a summary of the essential contents of the documents communicated to the Bureau by the Powers by virtue of Article 43, §§ 3 *and* 4.

ART. [XXIX.] L.—The expenses of the Bureau shall be borne by the [Signatory] *Contracting* Powers in the proportion fixed for the International Bureau of the Universal Postal Union.

Chapter III.—*On Arbitral Procedure*

ART. [XXX.] LI.—With a view to encourage the development of arbitration, the [Signatory] *Contracting* Powers have agreed on the following Rules, which [shall be] *are* applicable to arbitral procedure, unless other Rules have been agreed on by the Parties.

ART. [XXXI.] LII.—The Powers who have recourse to arbitration sign a [special Act ("] Compromis ["), in which the subject of the difference is [clearly] defined [as well as the extent of the arbitrators' powers. This Act implies the undertaking of the Parties to submit loyally to the Award],[1] *the time for the appointment of the arbitrators, the form, order and periods within which the communication referred to in Article* 63 *shall be made, and the amount which each Party shall deposit on account of expenses.*

The " compromis " shall also fix, if necessary, the mode in

[1] This part of the Article has been transposed to Article XXXVII.

which the arbitrators shall be appointed, all special powers which it may be requisite to confer on the Tribunal, its meeting-place, the language to be employed, and the languages the use of which may be authorised before it, and generally all conditions on which the Parties are agreed.

[ART. XXXII.—The duties of arbitrator may be conferred on one arbitrator alone or on several arbitrators selected by the Parties as they please, or chosen by them from the members of the permanent Court of Arbitration established by the present Act.

Failing the constitution of the Tribunal by direct agreement between the Parties, the following course shall be pursued :

Each Party appoints two arbitrators, and these latter together choose an umpire.

In case of equal voting, the choice of the umpire is entrusted to a third Power, selected by the Parties by common accord.

If no agreement is arrived at on this subject, each Party selects a different Power, and the choice of the umpire is made in concert by the Powers thus selected.]

ART. LIII.—*The permanent Court is competent for the drawing up of the "compromis," if the Parties are agreed to accept it.*

It is also competent, even if the application is made by only one of the Parties, when an arrangement through the diplomatic channel has been tried in vain, provided it relates to :

1. *A difference arising out of a general arbitration Treaty entered into or renewed after this Convention shall have come into force, and which provides for each difference a "Compromis," and which does not exclude, either expressly or implicitly, the competence of the Court to settle it. In any event, recourse to the Court shall not be admissible if the other Party declares that in its opinion the difference does not belong to the category of differences of a nature to be submitted to obligatory arbitration, unless the arbitration Treaty confers on the Court the power to decide this preliminary question ;*

2. *A difference arising out of contractual debts claimed from one Power by another Power as due to its nationals, and for the solution of which the offer of arbitration has been accepted.*

This provision is not applicable if the acceptance has been made subject to the condition that the "compromis" should be settled in another way.

ART. LIV.—*In cases provided for by the preceding Article, the "compromis" shall be settled by a Commission composed of five members appointed in the manner specified in Article* 45, §§ 3 *to* 6.

The fifth member is "de jure" *President of the Commission.*

ART. LV.—*Arbitral functions may be conferred on a single arbitrator or on several arbitrators appointed by the Parties as they may think proper, or selected by them from the members of the permanent Court of Arbitration established by the present Convention.*

In default of constitution of the Tribunal by agreement between the Parties, the procedure shall be as specified in Article 45, §§ 3 *to* 6.

ART. [XXXIII.] LVI.—When a Sovereign or the Chief of a State is chosen as arbitrator, the arbitral procedure is settled by him.

ART. [XXXIV.] LVII.—The umpire is by right President of the Tribunal.

When the Tribunal does not include an umpire, it appoints its own President.

ART. LVIII.—*In the event of the settlement of the "compromis" by a Commission, as provided in Article* 54, *and in the absence of any stipulation to the contrary, the Commission itself shall constitute the Tribunal of arbitration.*

ART. [XXXV.] LIX.—In the case of death, retirement or disability from any cause of one of the arbitrators, his place shall be filled in accordance with the method of his appointment.

[ART. XXXVI.—The Tribunal's place of session is selected by the Parties. Failing this selection the Tribunal sits at the Hague.

The place thus fixed cannot, except in case of necessity, be changed by the Tribunal without the assent of the Parties.]

ART. LX.—*Unless otherwise fixed by the Parties, the Tribunal shall hold its sittings at the Hague.*

The Tribunal may only hold its sittings on the territory of a third Power with the consent of the latter.

The place of sitting once fixed can only be changed by the Tribunal with the consent of the Parties.

ART. LXI.—*If the "compromis" has not fixed the languages to be used, this shall be decided by the Tribunal.*

ART. [XXXVII.] LXII.—The Parties have the right to appoint [delegates or] special agents to attend the Tribunal, for the purpose of serving as intermediaries between them and the Tribunal.

They are further authorised to retain, for the defence of their rights and interests before the Tribunal, counsel or advocates appointed by them for this purpose.

Members of the permanent Court cannot exercise the functions of agents, counsel or advocates except for the benefit of the Power which has appointed them members of the Court.

[ART. XXXVIII.—The Tribunal decides on the choice of languages to be used by itself, and to be authorised for use before it.] [1]

ART. [XXXIX.] LXIII.—As a general rule the arbitral procedure comprises two distinct phases: preliminary examination and discussion.

Preliminary *written* examination consists in the communication by the respective agents to the members of the Tribunal and to the opposite Party [of all printed or written Acts and of all documents containing the arguments invoked in the case. This communication shall be made in the form and within the periods fixed by the Tribunal in accordance with Art. XLIX.] *of memoirs, counter-memoirs, and, if necessary, replies; the Parties add all documents referred to in the case. This communication shall be made, either directly or through the medium of the International Bureau, in the order and within the periods fixed by the "compromis."*

The periods fixed by the "compromis" may be extended by the mutual agreement of the Parties or by the Tribunal, when the latter shall consider it necessary in order to arrive at a just decision.

[1] *See* Article LXI., which takes the place of this Article.

Discussion consists in the oral development before the Tribunal of the arguments of the Parties.

ART. [XL.] LXIV.—Every document produced by one Party must be communicated to the other Party.

ART. LXV.—*In the absence of special circumstances, the Tribunal will only sit after all the preliminary examination has been completed.*

ART. [XLI.] LXVI.—The discussions are under the direction of the President.

They are only public if it be so decided by the Tribunal, with the assent of the Parties.

They are recorded in the *procès-verbaux* drawn up by the Secretaries appointed by the President. These *procès-verbaux are signed by the President and by one of the Secretaries ; they* alone have an authentic character.

ART. [XLII.] LXVII.—When the preliminary examination is concluded, the Tribunal has the right to refuse discussion of all fresh Acts or documents which one Party may desire to submit to it without the consent of the other Party.

ART. [XLIII.] LXVIII.—The Tribunal is free to take into consideration fresh Acts or documents to which its attention may be drawn by the agents or counsel of the Parties.

In this case, the Tribunal has the right to require the production of these Acts or documents, but is obliged to make them known to the opposite Party.

ART. [XLIV.] LXIX.—The Tribunal can, besides, require from the agents of the Parties the production of all Acts, and can demand all necessary explanations. In case of refusal, the Tribunal takes note of it.

ART. [XLV.] LXX.—The agents and counsel of the Parties are authorised to present orally to the Tribunal all the arguments they may think expedient in defence of their case.

ART. [XLVI.] LXXI.—They have the right to raise objections and points.

The decisions of the Tribunal on those points are final, and cannot form the subject of any subsequent discussion.

ART. [XLVII.] LXXII.—The members of the Tribunal have the right to put questions to the agents and counsel of

the Parties, and to ask explanations from them on doubtful points.

Neither the questions put nor the remarks made by members of the Tribunal during the discussions can be regarded as an expression of opinion by the Tribunal in general, or by its members in particular.

ART. [XLVIII.] LXXIII.—The Tribunal is authorised to declare its competence in interpreting the " Compromis " as well as the other Treaties which may be invoked in the case and in applying the principles of international law.

ART. [XLIX.] LXXIV.—The Tribunal has the right to issue Rules of Procedure for the conduct of the case, to decide the forms, *the order* and periods within which each Party must conclude its *final* arguments, and to arrange all the formalities required for dealing with the evidence.

ART. LXXV.—*The Parties undertake to supply the Tribunal, as far as they possibly can, with all material requisite for the settlement of the matter at issue.*

ART. LXXVI.—*In respect of any notifications which the Tribunal may have to make on the territory of a third Contracting Power, the Tribunal shall address itself directly to the Government of that Power. The same applies where evidence has to be taken on the spot.*

Applications to this effect shall be complied with in accordance with the domestic legislation of the Power to whom the application is addressed. They can only be refused if this Power shall consider them of a nature to interfere with its sovereignty or its security.

The Tribunal shall always have the right of recourse to the intermediary of the Power on whose territory its sittings are held.

ART. [L.] LXXVII.—When the agents and counsel of the Parties have submitted all explanations and evidence in support of their case, the President pronounces the discussion closed.

ART. [LI.] LXXVIII.—The deliberations of the Tribunal take place in private *and remain secret.*

Every decision is taken by a majority of members of the Tribunal.

[The refusal of a member to vote must be recorded in the *procès-verbal.*]

ART. [LII.] LXXIX.—The Award[, given by a majority of votes,] is accompanied by a statement of reasons. *It shall mention the names of the arbitrators ; it is signed by the President and by the registrar, or by the secretary acting as registrar.* [It is drawn up in writing and signed by each member of the Tribunal.

Those members who are in the minority may record their dissent when signing.]

ART. [LIII.] LXXX.—The Award is read out at a public meeting [of the Tribunal], the agents and counsel of the Parties being present, or duly summoned to attend.

ART. [LIV.] LXXXI.—The Award, duly pronounced and notified to the agents of the Parties [at variance], puts an end to the dispute definitely and without appeal.

ART. LXXXII.—*Any difference which may arise between the Parties, relating to the interpretation and execution of the award, shall, in the absence of any stipulation to the contrary, be submitted to the decision of the Court which has delivered it.*

ART. [LV.] LXXXIII.—The Parties can reserve in the " compromis " the right to demand the revision of the Award.

In this case, and unless there be an [agreement] *stipulation* to the contrary, the demand must be addressed to the Tribunal which pronounces the Award. It can only be made on the ground of the discovery of some new fact calculated to exercise a decisive influence on the Award, and which, at the time the discussion was closed, was unknown to the Tribunal and to the Party demanding the revision.

Proceedings for revision can only be instituted by a decision of the Tribunal expressly recording the existence of the new fact, recognising in it the character described in the foregoing paragraph, and declaring the demand admissible on this ground.

The " compromis " fixes the period within which the demand for revision must be made.

ART. [LVI.] LXXXIV.—The Award is only binding on the Parties [who concluded the " Compromis "] *at variance.*

When there is a question of interpreting a convention to which Powers, other than those concerned in the dispute, are Parties, the latter [notify to the former the "Compromis" they have concluded] *notify within a suitable time all the Signatory Powers.* Each of these Powers has the right to intervene in the case. If one or more of them avail themselves of this right, the interpretation contained in the Award is equally binding on them.

ART. [LVII.] LXXXV.—Each Party pays its own expenses and an equal share of those of the Tribunal.

Chapter IV.—*Of Summary Proceedings in Arbitration*

ART. LXXXVI.—*With a view to facilitate proceedings in arbitration, when they concern disputes of a nature to be dealt with summarily, the Contracting Powers adopt the following rules which shall be followed in the absence of stipulations to the contrary, and under reserve, should the case arise, of the application of the provisions of Chapter III. which may not be inconsistent therewith.*

ART. LXXXVII.—*Each of the Parties in conflict appoints an arbitrator. The two arbitrators thus appointed choose an umpire. If they do not agree as to this, each shall submit two candidates selected from the general list of the members of the permanent Court, excluding the members indicated by each of the Parties themselves and not being nationals of their respective countries; which of these candidates shall be the umpire shall be determined by drawing lots.*

The umpire presides over the Tribunal which decides by the majority.

ART. LXXXVIII.—*In the absence of previous agreement, the Tribunal, as soon as it is constituted, fixes the period within which the two Parties are to submit their respective statements.*

ART. LXXXIX.—*Each Party is represented before the Tribunal by an agent who shall act as intermediary between the Tribunal and the Government which has appointed him.*

ART. XC.—*The proceedings shall be exclusively in writing. Each Party has, however, the right to apply for the calling*

of witnesses and experts. The Tribunal, on its side, has the power to require oral explanations from the agents of the two Parties, as well as from the witnesses and experts whose attendance it shall deem desirable.

[*General*] *Final Provisions*

ART. XCI.—*The present Convention, duly ratified, shall take the place in the relations between the Contracting Powers of the Convention for the pacific settlement of international disputes of July* 29, 1899.

ART. [LVIII.] XCII.—The present Convention shall be ratified as speedily as possible.

The ratifications shall be deposited at the Hague.

[A *procès-verbal* shall be drawn up recording the receipt of each ratification, and a copy duly certified shall be sent, through the diplomatic channel, to all the Powers who were represented at the International Peace Conference at the Hague.

The first deposit of ratifications shall be recorded by a minute signed by the representatives of the Powers taking part therein and by the Netherland Minister of Foreign Affairs.

Deposits of ratifications thereafter shall be effected by a written notification addressed to the Netherland Government and accompanied by the instrument of ratification.

A certified copy of the minute relating to the first deposit of ratifications, of the notifications mentioned in the preceding paragraph, as well as of the instruments of ratification, shall immediately be sent by the Netherland Government and by the diplomatic channel to the Powers convened to the second Peace Conference, as well as to the other Powers which shall have adhered to the Convention. In the cases referred to in the preceding paragraph, the said Government shall at the same time inform them of the date at which it received the notification.

[ART. LIX.—The non-Signatory Powers who were represented at the International Peace Conference can adhere to the present Convention. For this purpose they must make known their adhesion to the Contracting Powers by a written

notification addressed to the Netherland Government, and communicated by it to all the other Contracting Powers.]

ART. XCIII.—*Non-Signatory Powers which were convened to the second Peace Conference shall be allowed to adhere to the present Convention.*

Any Power wishing to adhere shall give notice of its intention in writing to the Netherland Government, and shall transmit to the latter the act of adhesion which shall be deposited in the archives of the said Government.

The said Government shall immediately transmit to all the other Powers which were convened to the second Peace Conference a certified copy of the notification and also of the act of adhesion, and indicate the date at which it received the notification.

ART. [LX.] XCIV.—The conditions on which the Powers who were not [represented at] *convened to* the *second* [International] Peace Conference can adhere to the present Convention shall form the subject of a subsequent Agreement among the Contracting Powers.

ART. XCV.—*The present Convention shall take effect as regards the Powers who shall have taken part in the first deposit of ratifications, sixty days after the date of the minute of this deposit, and as regards the Powers who shall ratify thereafter, or who shall adhere, sixty days after notification of their ratification or of their adhesion, shall have been received by the Netherland Government.*

ART. XCVI.—*In the event of one of the Contracting Powers wishing to denounce the present Convention, such denunciation shall be notified in writing to the Netherland Government, who shall at once communicate a certified copy of the notification to all the other Powers, mentioning at the same time the date at which it was received.*

The denunciation shall only have effect in respect of the Power having made it, and one year from the date on which the Netherland Government shall have received it.

ART. XCVII.—*A register kept by the Netherland Ministry of Foreign Affairs shall indicate the date of the deposit of ratifications effected by virtue of Art. XCII., §§ 3 and 4, and also the*

date of receipt of the notifications of adhesion (*Art. XCIII.*, § 2), *or of denunciation* (*Art. XCVI.*, § 1).

Each Contracting Power shall have a right to examine this register, and to apply for certified extracts therefrom.

[ART. LXI.—In the event of one of the High Contracting Parties denouncing the present Convention, this denunciation would not take effect until a year after its notification made in writing to the Netherland Government, and by it communicated at once to all the other Contracting Powers.

This denunciation shall only affect the notifying Power.

In faith of which the Plenipotentiaries have [signed] *affixed their signatures to* the present Convention [and affixed their seals to it].

Done at the Hague [July 29, 1899], *October* 18, 1907, in a single copy, which shall remain deposited in the archives of the Netherland Government, and copies of it, duly certified, shall be sent through the diplomatic channel to the Contracting Powers.

[*Signatures.*]

II

PROPOSED CONVENTION RELATING TO THE ESTABLISHMENT OF AN ARBITRAL COURT OF JUSTICE (1907)

Title I.—Organisation of the Arbitral Court of Justice

Art. I.—With a view to promoting the cause of arbitration, the Contracting Powers have agreed to organise, without interfering with the permanent Arbitration Court, an Arbitration Court of Justice, freely and easily accessible, based upon the judicial equality of States, bringing together judges representing the different judicial systems of the world, and capable of assuring the continuity of arbitral jurisprudence.

Art. II.—The Arbitral Court of Justice shall be composed of judges and assistant judges selected among persons enjoying the highest moral esteem, all of whom shall fulfil the necessary conditions, in their respective countries, for admission into the higher ranks of the judiciary, or be competent and well-known lawyers in matters of international law.

The judges and assistant judges of the Court shall be selected, as far as possible, among the members of the permanent Court of Arbitration. The choice shall be made within the six months following the ratification of the present Convention.

Art. III.—The judges and assistant judges shall be appointed for a period of twelve years from the date of the notification of their appointment to the Administrative Council instituted by the Convention for the peaceful settlement of international conflicts. They may be reappointed.

In case of the death or resignation of a judge or assistant judge, he shall be replaced in the manner fixed for his appointment. In that case, the appointment shall be made for a further period of twelve years.

ART. IV.—The judges of the Arbitral Court of Justice are all equal among themselves, and shall rank according to the date of the notification of their appointment. Precedence shall be given to the eldest, where the date is the same.

Assistant judges shall, in the exercise of their duties, be assimilated to the ordinary judges. They shall, however, rank after the latter.

ART. V.—The judges shall enjoy diplomatic privileges and immunities in the exercise of their duties and outside their respective countries.

Before entering upon their duties the judges and assistant judges shall take oath, or make a solemn undertaking before the Administrative Council, to exercise their functions with impartiality and in all conscientiousness.

ART. VI.—The Court shall annually appoint three judges who form a special Delegation, and three others to replace them if they are prevented. They may be re-elected. The election shall be made by ballot on a list. Those who have the greatest number of votes shall be elected. The Delegation shall elect its own President, who, in default of a majority, shall be elected by drawing of lots.

No member of the Delegation can exercise his duties when the Power by which he has been appointed, or of which he is a subject or citizen, is one of the Parties.

The members of the Delegation shall finish the matters which have been submitted to them, even if their period of office has expired.

ART. VII.—No judge may exercise judicial duties in matters in which he has in any way whatsoever taken part in the decision of a national Court, Arbitration Court, or Commission of Inquiry, or has acted in the case as counsel or advocate of one of the Parties.

No judge shall have the right to act as agent or advocate before the Arbitral Court of Justice, or the permanent Court

of Arbitration, or a special Court of Arbitration, or a Commission of Inquiry, or to act for any Party in any capacity whatsoever, during his period of office.

ART. VIII.—The Court shall elect its President and vice-President by an absolute majority of the votes given. After two ballots, the election shall be made by the relative majority, and, in case the votes are equal, the decision shall be left to the drawing of lots.

ART. IX.—The judges of the Arbitral Court of Justice shall receive an annual indemnity of six thousand Dutch florins. This indemnity shall be paid at the expiry of every six months from the date of the first meeting of the Court.

While exercising their duties during sessions or in the special cases provided for in the present Convention, they shall receive a sum of one hundred florins a day. They shall, moreover, receive an indemnity for their journey fixed by the regulations of their country. The provisions of the present paragraph shall also apply to the assistant judges replacing the judges.

These payments, included in the general expenses of the Court, stipulated by Article XXXIII., shall be paid through the International Bureau instituted by the Convention for the peaceful settlement of international conflicts.

ART. X.—The judges shall not receive from their own Government or from that of any other Power any remuneration for services included in their duties as members of the Court.

ART. XI.—The Arbitral Court of Justice shall sit at the Hague, and shall not, except in case of *vis major*, be transferred anywhere else.

The Delegation may, with the consent of the Parties, choose another place to hold its meetings under special circumstances.

ART. XII.—The Administrative Council fulfils as regards the Arbitral Court of Justice the same duties as it fulfils as regards the permanent Court of Arbitration.

ART. XIII.—The International Bureau serves as Registrar to the Arbitral Court of Justice, and shall put its offices and

organisation at the disposition of the Court. It shall be entrusted with the archives and with the management of administrative matters.

The General Secretary of the Bureau shall act as Registrar.

The Registrar's secretaries and the necessary translators and stenographers shall be appointed and sworn by the Court.

ART. XIV.—The Court assembles in session once a year. The session begins on the third Wednesday in June and lasts till all the questions at issue have been settled.

The Court shall not assemble in session if the Delegation does not consider it necessary to do so. Nevertheless, if a Power is a party in a case at present [1] pending before the Court the examination of which is closed or is on the point of being closed, it shall have the right to insist upon the assembly taking place.

In case of necessity, the Delegation may call the Court together for an extraordinary session.

ART. XV.—A report of the work of the Court shall be drawn up every year by the Delegation. This report shall be sent to the Contracting Powers through the International Bureau. It shall be also communicated to all the judges and assistant judges of the Court.

ART. XVI.—The judges and assistant judges, members of the Arbitral Court of Justice, may also be appointed to the duties of judge and assistant judge in the international Prize Court.

TITLE II.—COMPETENCE AND PROCEDURE

ART. XVII.—The Arbitral Court of Justice shall be competent to judge all cases submitted to it, in virtue of a general arbitration stipulation or of a special agreement.

ART. XVIII.—The Delegation is competent :

1. To judge arbitration cases stipulated in the preceding Article, if the Parties are agreed to claim the application of the summary procedure fixed by Title IV.,

[1] *Actuellement* means "at present," but the French word is probably a mistranslation of some English word.

Chapter 4, of the Convention for the pacific settlement of international disputes ;

2. To institute an inquiry in virtue of and in conformity with Title III. of the said Convention in so far as the Delegation is entrusted therewith by the Parties acting by common consent. With the consent of the Parties and by way of exception to Article VII., § 1, the members of the Delegation having taken part in the inquiry may act as judges, if the case is submitted to the arbitration of the Court or of the Delegation itself.

ART. XIX.—The Delegation is, moreover, competent to draw up the *compromis* stipulated by Article LII. of the Convention for the settlement of international disputes, if the Parties are agreed to refer it to the Court.

It is also competent, even if the application is made by one of the Parties, when, agreement by diplomatic means having failed, it is a question of :

1. A difference comprised in the general Arbitration Treaty concluded or renewed after the coming into force of the present Convention, and which provides for each difference a *compromis*, and does not explicitly or implicitly exclude for the drawing up of the latter the competence of the Delegation. However, recourse to the Court shall not take place, if the other Party declares that in its opinion the difference does not belong to the kind of questions to be submitted to obligatory arbitration, unless the Arbitration Treaty should give the Arbitral Tribunal the right to decide this preliminary question.
2. A difference based upon contractual debts claimed by one Power from another as due to its subjects or citizens, and for the solution of which the offer of arbitration has been accepted. This provision is not applicable if the acceptance has been made subject to the condition that the *compromis* be drawn up in some other way.

ART. XX.—Each of the Parties has the right to appoint

a judge of the Court to take part, with power to join in the decision, in the examination of the matter submitted to the Delegation.

If the Delegation acts as a Commission of Inquiry, this mandate may be entrusted to persons selected outside the judges of the Court. The expenses and the remuneration to be paid to the said persons shall be fixed and borne by the Powers by which they have been appointed.

ART. XXI.—Access to the Arbitral Court of Justice instituted by the present Convention is free to the Contracting Powers only.

ART. XXII.—The Arbitral Court of Justice shall follow the rules of procedure set out by the Convention for the peaceful settlement of international disputes, except where otherwise prescribed by the present Convention.

ART. XXIII.—The Court shall decide upon the choice of the language to be used, and the languages the use of which shall be authorised before it.

ART. XXIV.—The International Bureau shall serve as intermediary for all communications to be made to the judges during the examination of the affair, provided for by Article LXIII., § 2, of the Convention for the peaceful settlement of international disputes.

ART. XXV.—For all notifications to be made, in particular to the Parties, witnesses and experts, the Court may address itself directly to the Government of the Power upon whose territory the notification is to be effected. The same shall apply where the procuring of evidence is concerned.

Requests addressed to this effect can only be refused where the requesting Power considers them prejudicial to its sovereignty or security. If effect is given to the request, the expenses shall only include the costs of execution really incurred.

The Court may also have recourse to the medium of the Power upon whose territory it sits.

The notifications to be made to the Parties in the place where the Court is sitting may be effected by the International Bureau.

ART. XXVI.—The arguments shall be directed by the President and vice-President and, in case of absence or prevention of one or the other, by the eldest judge present.

A judge appointed by one of the Parties cannot act as President.

ART. XXVII.—The deliberations of the Court shall take place with closed doors, and shall remain secret.

All decisions shall be taken by the majority of the judges present. If the Court sits in even number and the votes are equally divided, the vote of the last of the judges, in the order of precedence as set out in Article IV., § 1, shall not be counted.

ART. XXVIII.—The motives of the decisions of the Court shall be therein given. The decisions shall mention the names of the judges who have taken part therein, and shall be signed by the President and by the Registrar.

ART. XXIX.—Each Party shall bear its own costs and an equal part of the special expenses of the procedure.

ART. XXX.—The provisions of Articles XXI. to XXIX. are applied by analogy in the procedure before the Delegation.

When the right to adjoin a member to the Delegation has only been exercised by one Party, the vote of the assistant member shall not be counted if the votes are equal on both sides.

ART. XXXI.—The general expenses of the Court shall be supported by the Contracting Powers.

The Administrative Council shall apply to the Powers to obtain the funds necessary for the working of the Court.

ART. XXXII.—The Court shall itself make its internal regulations, which shall be communicated to the Contracting Powers.

After ratification of the present Convention, the Court shall assemble as soon as possible, to draw up these regulations, to elect the President and vice-President, as well as appoint the members of the Delegation.

ART. XXXIII.—The Court may propose modifications to the provisions of the present Convention concerning procedure. These propositions shall be communicated through

the Netherland Government to the Contracting Powers, who shall decide what effect shall be given to them.

Title III.—Final Provisions

Art. XXXIV.—The present Convention shall be ratified as soon as possible.

The ratifications shall be deposited at the Hague.

Minutes shall be recorded of the deposit of each ratification, of which a certified copy shall be communicated through the diplomatic channel to all the Signatory Powers.

Art. XXXV.—The Convention shall come into force six months after the date of its ratification.

It shall be valid for a period of twelve years, and shall be tacitly renewed from twelve to twelve years, unless it be denounced.

Denunciation must be notified at least two years before the expiry of each period to the Netherland Government, which shall communicate it to the other Powers.

Denunciation shall only have effect as regards the Power who has notified. The Convention shall remain in force among the other Powers.

III

CONVENTION RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT (1907)

(*Names of the High Contracting Parties*)

ANIMATED by the desire to settle in an equitable manner differences which arise from time to time in maritime warfare, in connection with decisions of national Prize Courts.

Holding, that if such Courts are to continue to give decisions in accordance with the forms prescribed by their legislation, it is important that, in certain cases, recourse be provided under conditions harmonising, as far as possible, with the public and private interests involved in all Prize cases ;

Considering, on the other hand, that the formation of an international Court with a carefully regulated competence and procedure seems the best means of attaining this object ;

Being, moreover, convinced that in this manner the rigorous consequences of a maritime war may be attenuated : that, in particular, good relations between belligerents and neutrals are more likely to be maintained, and, in consequence, the preservation of peace better assured ;

Desiring to conclude a Convention to this effect, have named as their Plenipotentiaries the following :

(*Names and Description of Plenipotentiaries*)

Who, after having deposited their full powers, found in good and due form, have agreed upon the following provisions :

TITLE I.—GENERAL PROVISIONS

ART. I.—The validity of the capture of a merchant vessel or of its cargo is, if neutral or enemy property is concerned,

decided by a Prize Court in accordance with the present Convention.

ART. II.—The Prize jurisdiction is exercised in the first place by the Prize Courts of the capturing belligerent.

The decisions of these Courts are delivered at public sittings or notified *ex officio* to the neutral or enemy Parties.

ART. III.—The decisions of national Prize Courts may be the subject of appeal to the international Prize Court :

1. When the decisions of the national Courts concern the property of a neutral State or individual ;
2. When the said decision concerns enemy property and relates to :
   (*a*) goods on board a neutral vessel ;
   (*b*) an enemy vessel, captured in the territorial waters of a neutral Power, in case that Power has not made such capture a matter of diplomatic claim ;
   (*c*) a claim founded on an allegation that the capture had been effected in violation either of a Treaty provision in force between the belligerent Powers, or of a provision in the laws by the capturing belligerent.

The recourse against the decision of the national Courts may be based on the allegation that such decision is not justified, either *de facto* or *de jure*.

ART. IV.—Recourse may be exercised :

1. By a neutral Power if the decision of the national Court is prejudicial to its property or to that of its subjects or citizens (Article III., § 1), or if it is alleged that the capture of an enemy vessel has taken place in the territorial waters of that Power (Article III., § 2 (*b*)) ;
2. By a private neutral, if the decision of the national Court is prejudicial to its property (Article III., § 1), subject, however, to the right of the Power of which he is a subject or citizen to forbid him access of the Court, or to act itself in his name and place ;
3. By a private individual belonging to the enemy Power, if the decision of the national Courts is prejudicial

to his property under the conditions set out in Article III., § 2, excepting the case provided for in subsection (*b*).

ART. V.—Recourse may also be exercised, in the same conditions as in the preceding Article, by the legal representatives, neutral or enemy, of the private person to whom recourse is granted, and who have appeared before the national jurisdiction. These legal representatives may individually exercise the recourse to the extent of their interest.

This applies also to the legal representatives, neutral or enemy, of the neutral Power whose property is involved.

ART. VI.—When, in accordance with Article III., the international Court is competent, the right of jurisdiction of the national Courts can only be exercised to the extent of two degrees. It is for the legislation of the capturing belligerent to decide whether the recourse is open after the first decision has been delivered or only after it has been delivered on appeal or by the Court of Cassation.[1]

If the national Courts fail to deliver a final decision within two years from the date of capture, the Court [2] may be seized directly.

ART. VII.—If the legal question involved is provided for by a Convention in force between the capturing belligerent and the Power which is itself a party in the case, or whose subject or citizen is a party thereto, the Court complies with the stipulations of the said Convention.

In default of such stipulations, the Court applies the rules of international law. If there are no generally recognised rules in existence, the Court decides in accordance with the general principles of justice and equity.

The above provisions are alike applicable as regards the order of the evidence and the methods which may be employed.

If, in accordance with Article III., § 2 (*c*), the recourse is founded upon the violation of a provision in the laws of the capturing belligerent, the Court applies that provision.

[1] To include the Court of Cassation not only adds a third degree, but even opens up the possibility of a re-trial by the national Court.

[2] That is, the international Court.

The Court may disregard any forfeiture owing to non-observance of procedure forming part of the legislation of the capturing belligerent, in cases where it considers that the consequences are contrary to justice and equity.

ART. VIII.—If the Court pronounces the validity of the capture of the vessel or of the cargo, it shall be disposed of in accordance with the laws of the capturing belligerent.

If the capture be pronounced null and void, the Court orders the restitution of the vessel or of the cargo, and fixes, if necessary, the amount of the indemnity to be paid. If the vessel or cargo has been sold out or destroyed, the Court fixes the indemnity to be granted in respect thereof to the owner.

If the nullity of the capture had been pronounced by the national jurisdiction, the Court has only to fix the amount of the indemnity.

ART. IX.—The Contracting Powers shall undertake to submit in good faith to the decisions of the international Prize Court, and to execute them with as little delay as possible.

TITLE II.—ORGANISATION OF THE INTERNATIONAL PRIZE COURT

ART. X.—The international Prize Court shall be composed of judges and assistant judges appointed by the Contracting Parties, all of whom shall be lawyers whose competence in matters of international maritime law is well known, and who enjoy the highest moral reputation.

The appointment of such judges and assistant judges shall take place within six months from the ratification of the present Convention.

ART. XI.—The judges and assistant judges are appointed for a period of six years from the date at which their appointment shall have been received by the Administrative Council instituted by the Convention for the peaceful settlement of international conflicts of July 29, 1899. They may be re-appointed.

In case of the death or resignation of a judge or assistant judge, he shall be replaced in the same way as fixed for his

appointment. In this case the appointment is made for a further period of six years.

ART. XII.—The judges of the international Prize Court are all equal, and take rank from the date at which notice of their appointment is received (Article XI., § 1), and, if they sit each in turn (Article XV., § 2), according to the date of their taking up their duties. Precedence belongs to the older in case the date is the same.

Assistant judges are in the exercise of their duties assimilated to the ordinary judges. Nevertheless they rank after the latter.

ART. XIII.—Judges enjoy diplomatic privileges and immunities in the exercise of their duties and outside their own country.

Before entering upon their duties, the judges shall take oath or solemnly undertake before the Administrative Council to exercise their functions impartially and conscientiously.

ART. XIV.—The Court is composed of fifteen judges, nine of whom constitute the necessary quorum.

When a judge is absent or prevented from sitting, he is replaced by the assistant judge.

ART. XV.—Judges appointed by the following Contracting Powers—Germany, the United States of America, Austria-Hungary, France, Great Britain, Italy, and Japan and Russia —are always called upon to sit.

The judges and assistant judges appointed by the other Contracting Powers sit in turns, according to the schedule annexed to the present Convention; their duties may be exercised successively by the same person. The same judge may be appointed by several of the said Powers.

ART. XVI.—If any belligerent Power has not, according to the roll, a judge sitting on the Court, such Power may request that the judge whom it has appointed shall take part in the judgment of all matters arising out of the war. In this case it shall be decided by drawing lots which of the sitting judges shall abstain. This exclusion shall not apply to the judge appointed by the other belligerent.

ART. XVII.—No judge, having in any way whatsoever

taken part in the decision of the national Courts, or having acted as counsel or advocate to either Party, shall sit.

No judge, ordinary or assistant, shall intervene as agent or advocate before the international Prize Court, or act for either Party, in any capacity whatsoever, throughout his period of office.

ART. XVIII.—The capturing belligerent has the right to appoint a naval officer of high rank to sit as assessor, with power to express his opinions. The same right belongs to the neutral Power which is itself a party in the case, or to the Power whose subject or citizen is a party in it ; if, by reason of the application of this last provision, several Powers are interested, they must determine, if need be by the drawing of lots, who shall be the officer appointed.

ART. XIX.—The Court elects its President and vice-President by an absolute majority of votes. After polling twice, the election shall be determined by the relative majority of votes ; and in case the votes are equally divided, drawing of lots shall be resorted to.

ART. XX.—The judges of the international Prize Court shall receive an indemnity for their journey, the amount of which shall be fixed according to the regulations of their country, and shall receive in addition, during the session or during the exercise of the functions conferred by the Court, a sum of one hundred Dutch florins a day.[1]

The said allowance, included in the general expenses of the Court, provided by Article XLVII., shall be paid by the International Bureau, instituted by the Convention of July 29, 1899.

The judges shall not receive from their own Government or from any other Government any remuneration as members of the Court.

ART. XXI.—The international Prize Court shall sit at the Hague, and shall not, except in case of *vis major*, be removed elsewhere, and only then with the consent of the belligerent Parties.

ART. XXII.—The Administrative Council, in which only

[1] That is £8 to £9 a day.

the representatives of the Contracting Powers are represented, discharges the same duties in regard to the international Prize Court as it discharges in regard to the permanent Arbitration Court.

ART. XXIII.—The International Bureau serves as Registration Office to the international Prize Court, and shall place its offices and organisation at the disposal of the Court. It has charge of the archives and the management of administrative matters.

The general secretary of the International Bureau acts as Registrar.

The secretaries of the Registrar, translators and stenographers are appointed and duly sworn by the Court.

ART. XXIV.—The Court decides upon the choice of the language it shall use and the languages authorised to be used before it.

In any case, the official language of the national Courts who have dealt with the matter may be employed before the Court.

ART. XXV.—The interested Powers have the right to appoint special agents, whose mission is to serve as intermediaries between them and the Court. They are, moreover, authorised to entrust counsel or advocates with the defence of their rights and interests.

ART. XXVI.—Interested private persons shall be represented before the Court by a representative, who shall be either an advocate authorised to plead before a Court of Appeal or a Supreme Court of one of the contracting countries, or a solicitor practising before any such Court, or, lastly, a professor of law at an institution of University rank of one of these countries.

ART. XXVII.—For all notices to be given, in particular to the parties, witnesses, and experts, the Court may address itself directly to the Government of the Power upon whose territory the notice has to be effected. The same shall apply where the object is to procure any kind of evidence.

Requests addressed to this effect shall be carried out according to the means which the requisitioned Power dis-

poses of according to its domestic legislation. They can only be refused in case that Power considers them of a nature prejudicial to its sovereignty or security. If the request is acted upon, the expenses only include the execution actually effected.

The Court has also the right to employ the services of the Power on whose territory it is acting.

The notices to be made to the parties in the place where the Court is sitting may be made by the International Bureau.

Title III.—Procedure before the International Prize Court

Art. XXVIII.—Recourse to the international Prize Court is effected by means of a written declaration, made before the national Court which decided the case, or addressed to the International Bureau; the latter may be informed even by telegram.

The delay of recourse is fixed at one hundred and twenty days from the date at which the decision was delivered or notified (Article II., § 2).

Art. XXIX.—If the declaration of recourse is made before the national Court, the latter, without examining if the time fixed has been observed, has the papers of the matter sent to the International Bureau within the seven following days.

If the declaration of recourse is addressed to the International Bureau, the latter shall immediately notify the national Court to this effect, by telegram if possible. The Court shall transmit the papers as provided for in the preceding clause.

When the recourse is effected by a neutral private person, the International Bureau shall immediately advise by telegram the Power to which he belongs, so that the said Power may take advantage of the right accorded by Article IV., § 2.

Art. XXX.—In the case provided for by Article VI., § 2, the recourse can only be addressed to the International Bureau. It must be lodged within thirty days after the expiry of the two years.

ART. XXXI.—In case of failure of a party to enter recourse within the time fixed by Article XXVIII. or Article XXX., the application shall be rejected without discussion.

However, if the delay is shown to be due to *vis major*, and if the recourse has been entered within the sixty days from the cessation of the cause of such delay, the application may still be considered, the adverse party having been duly heard.

ART. XXXII.—If the recourse has been entered in due time, the Court gives notice *ex officio* by a certified copy of the declaration to the adverse party.

ART. XXXIII.—If, outside the parties who have entered recourse to the Court, there are others interested having a right to enter recourse, or if, in the case provided for by Article XXIX., § 3, the Power which has been notified has not made known its determination, the Court waits, before taking up the matter, till the time stipulated by Article XXVIII. or Article XXX. has expired.

ART. XXXIV.—The procedure before the international Court has two distinct stages: the written procedure and oral debates.

The written procedure consists in the deposit and exchange of statements, of counter statements, and, if necessary, of replies, the order and time for which shall be decided by the Court. The parties shall add thereto such documents as they may intend to make use of.

All documents produced by a party shall be communicated by certified copies to the other party by the intermediary of the Court.

ART. XXXV.—The written procedure being terminated, there shall be a public hearing, the date of which shall be fixed by the Court.

At that hearing the parties explain the nature of the issue in fact and in law.

The Court may at any stage in the case suspend the arguments, either at the request of one of the parties or *ex officio*, in order to obtain further evidence.

ART. XXXVI.—The international Court may order that the further evidence be taken, either in accordance with

Article XXVII., or directly before it or before one or several of its members, so long as it can be effected without coercive or comminatory means.

If the evidence has to be obtained by members of the Court outside the territory where it is sitting, the consent of the foreign Government has to be obtained.

ART. XXXVII.—The parties are cited [1] to be present at all the measures connected with the taking of the evidence. They shall receive a certified copy of all the minutes.

ART. XXXVIII.—The arguments shall be directed by the President or Vice-President, and in case of one or the other being absent or prevented, by the eldest judge present.

The judge appointed by a belligerent party cannot preside.

ART. XXXIX.—The arguments are public, unless one of the Powers concerned in the case should apply to have them heard with closed doors.

They shall be recorded on the minutes, which shall be signed by the President and the Registrar, and which alone shall have an official character.

ART. XL.—In case one of the parties should not appear, although duly cited, or in case such party should fail to take the necessary steps in the time fixed by the Court, proceedings shall go on without such party, and the Court decides according to the evidence which it has at its disposal.

ART. XLI.—The Court shall, *ex officio*, notify to the parties all the decisions or orders made in their absence.

ART. XLII.—The Court shall form its opinion freely upon all documents, evidence, and oral declarations.

ART. XLIII.—The deliberations of the Court take place with closed doors, and remain secret.

Decisions are taken by a majority of judges present. If there are an even number of judges sitting and the votes are equally divided, the vote of the last judge in the order of precedence, as provided by Article XII., § 1, is not counted.

ART. XLIV.—The judgment of the Court shall state its motives. It shall mention the names of judges delivering it,

[1] The word "appelé" is vague and ambiguous. Probably the draftsman meant "cité" (cited), as in Article XL.

as well as the names of the assessors, if any; it shall be signed by the President and Registrar.

ART. XLV.—The judgment is delivered at a public sitting, the parties being present or duly called; it is, *ex officio*, notified to the parties.

The notification having been effected, the Court shall hand to the national Prize Court the papers of the case, together with an official copy of the various decisions arrived at, and a copy of the minutes of the proceedings.

ART. XLVI.—Each party shall bear the costs of its own defence.

The defeated party also bears the costs of procedure. It pays, in addition, one hundredth part of the value of the matter at issue as a contribution to the general expenses of the international Court. The amount of these payments shall be fixed by the Court.

If the recourse is entered by a private person, the latter shall deposit as security with the International Bureau an amount which shall be fixed by the Court, and the object of which is to guarantee the fulfilment of the two obligations imposed by the preceding paragraph. The Court may subordinate the opening of the procedure to the deposit of the security.

ART. XLVII.—The general expenses of the international Prize Court shall be borne by the Contracting Powers in the proportion of their participation in the working of the Court, as provided for in Article XV. and the schedule hereto annexed. No contribution is entailed by the appointment of the assistant judges.

The Administrative Council shall apply to the Powers to obtain the necessary funds for the working of the Court.

ART. XLVIII.—When the Court is not sitting, the functions which have been entrusted to it by Article XXXII., Article XXXIV., §§ 2 and 3, Article XXXV., § 1, and Article XLVI., § 3, shall be exercised by a delegation of three judges appointed by the Court. This delegation decides by a majority of the votes.

ART. XLIX.—Within a year of the ratification of the

present Convention, it shall assemble to draw up these regulations.

The Court shall itself draw up the regulations for its internal government, which shall be communicated to the Contracting Powers.

ART. L.—The Court may propose modifications to be made to the provisions of the present Convention concerning procedure. Any such proposals shall be communicated through the Netherland Government to the Contracting Powers, which shall concert as to the effect to be given to them.

TITLE IV.—FINAL PROVISIONS

ART. LI.—The present Convention shall only be applicable *ipso facto* if all the belligerent Powers are parties thereto.

It is understood, moreover, that recourse to the international Prize Court shall only be exercised by a Contracting Power, or subjects or citizens of a Contracting Power.

In the case of Article V., recourse is only granted when the owner and his legal representative are also Contracting Powers, or subjects or citizens of Contracting Powers.

IV

TREATY OF ARBITRATION BETWEEN GREAT BRITAIN AND THE UNITED STATES

Signed January 12, 1897

ART. I.—The High Contracting Parties agree to submit to arbitration, in accordance with the provisions and subject to the limitations of this Treaty, all questions in difference between them which they may fail to adjust by diplomatic negotiation.

ART. II.—All pecuniary claims, or groups of pecuniary claims, which do not, in the aggregate, exceed £100,000 in amount, and which do not involve the determination of territorial claims, shall be dealt with and decided by an Arbitral Tribunal constituted as provided in the following Article.

In this Article and in Article IV. the words "groups of pecuniary claims" mean pecuniary claims by one or more persons arising out of the same transactions or involving the same issues of law and of fact.

ART. III.—Each of the High Contracting Parties shall nominate one arbitrator, who shall be a jurist of repute, and the two arbitrators so nominated shall, within two months of the date of their nomination, select an umpire. In case they shall fail to do so within the limit of the time above mentioned, the umpire shall be appointed by agreement between the members for the time being of the Judicial Committee of the Privy Council in Great Britain and the members for the time being of the Supreme Court of the United States, each nominating body acting by a majority. In case they

shall fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the High Contracting Parties, or either of them, the umpire shall be selected in the manner provided for in Article X.

The person so selected shall be the President of the Tribunal, and the Award of the majority of the members thereof shall be final.

ART. IV.—All pecuniary claims, or groups of pecuniary claims, which shall exceed £100,000 in amount, and all other matters in difference in respect of which either of the High Contracting Parties shall have rights against the other under Treaty or otherwise, provided that such matters in difference do not involve the determination of territorial claims, shall be dealt with and decided by an Arbitral Tribunal, constituted as provided in the next following Article.

ART. V.—Any subject of arbitration described in Article IV. shall be submitted to the Tribunal provided for by Article III., the Award of which Tribunal, if unanimous, shall be final. If not unanimous, either of the High Contracting Parties may, within six months from the date of the Award, demand a review thereof. In such case the matter in controversy shall be submitted to an Arbitral Tribunal, consisting of five jurists of repute, no one of whom shall have been a member of the Tribunal whose Award is to be reviewed, and who shall be selected as follows, viz., two by each of the High Contracting Parties, and, one to act as umpire, by the four thus nominated and to be chosen within three months after the date of their nomination. In case they shall fail to choose an umpire within the limit of time above mentioned, the umpire shall be appointed by Agreement between the nominating bodies designated in Article III., acting in the manner therein provided. In case they shall fail to agree upon an umpire within three months of the date of an application made to them in that behalf by the High Contracting Parties, or either of them, the umpire shall be selected in the manner provided for in Article X.

The person so selected shall be the President of the

Tribunal, and the Award of the majority of the members thereof shall be final.

ART. VI.—Any controversy which shall involve the determination of territorial claims shall be submitted to a Tribunal composed of six members, three of whom (subject to the provisions of Article VIII.) shall be judges of the British Supreme Court of Judicature or members of the Judicial Committee of the Privy Council, to be nominated by His Britannic Majesty, and the other three of whom (subject to the provisions of Article VIII.) shall be judges of the Supreme Court of the United States or justices of the Circuit Courts to be nominated by the President of the United States, whose Award, by a majority of not less than five to one, shall be final. In case of an Award made by less than the prescribed majority, the Award shall also be final unless either Power shall, within three months after the Award has been reported, protest that the same is erroneous, in which case the Award shall be of no validity.

In the event of an Award made by less than the prescribed majority, and protested as above provided, or if the members of the Arbitral Tribunal shall be equally divided, there shall be no recourse to hostile measures of any description until the mediation of one or more friendly Powers has been invited by one or both of the High Contracting Parties.

ART. VII.—Objections to the jurisdiction of an Arbitral Tribunal constituted under this Treaty shall not be taken except as provided in this Article.

If, before the close of the hearing upon a claim submitted to an Arbitral Tribunal constituted under Article III. or Article V., either of the High Contracting Parties shall move such Tribunal to decide, and thereupon it shall decide, that the determination of such claim necessarily involves the decision of a disputed question of principle of grave general importance affecting the national rights of such Party, as distinguished from the private rights whereof it is merely the international representative, the jurisdiction of such Arbitral Tribunal over such claim shall cease, and the same shall be dealt with by arbitration under Article VI.

ART. VIII.—In cases where the question involved is one which concerns a British Colony or possession, it shall be open to His Britannic Majesty to appoint a judicial officer of such Colony or possession to be one of the arbitrators under Article III., or Article V., or Article VI.

In like manner, in cases where the question involved is one which concerns a particular State or territory of the United States, it shall be open to the President of the United States to appoint a judicial officer of such State or territory to be one of the arbitrators under Article III., or Article V., or Article VI.

ART. IX.—Territorial claims in this Treaty shall include all claims to territory and all claims involving questions of servitudes, rights of navigation and of access, fisheries, and all rights and interests necessary to the control and enjoyment of the territory claimed by either of the High Contracting Parties.

ART. X.—If in any case the nominating bodies designated in Articles III. and V. shall fail to agree upon an umpire in accordance with the provisions of the said Articles, the umpire shall be appointed by His Majesty the King of Sweden and Norway.

Either of the High Contracting Parties, however, may at any time give notice to the other that, by reason of material changes in conditions as existing at the date of this Treaty, it is of opinion that a substitute for His Majesty should be chosen, either for all cases to arise under the Treaty, or for a particular specified case already arisen, and thereupon the High Contracting Parties shall at once proceed to agree upon such substitute to act, either in all cases to arise under the Treaty, or in the particular case specified, as may be indicated by said notice shall have no effect upon an arbitration already begun by the Constitution of an Arbitral Tribunal under Article III.

The High Contracting Parties shall also at once proceed to nominate a substitute for His Majesty in the event that His Majesty shall at any time notify them of his desire to be relieved from the functions graciously accepted by him under

this Treaty, either for all cases to arise thereunder, or for any particular specified case already arisen.

ART. XI.—In case of the death, absence or incapacity to serve of any arbitrator or umpire, or in the event of any arbitrator or umpire omitting or declining or ceasing to act as such, another arbitrator or umpire shall be forthwith appointed in his place and stead in the manner provided for with regard to the original appointment.

ART. XII.—Each Government shall pay its own agent, and provide for the proper remuneration of the Counsel employed by it and of the arbitrators appointed by it, and for the expense of preparing and submitting its case to the Arbitral Tribunal. All other expenses connected with any arbitration shall be defrayed by the two Governments in equal moieties. Provided, however, that if in any case the essential matter of difference submitted to arbitration is the right of one of the High Contracting Parties to receive disavowals of, or apologies for, acts or defaults of the other not resulting in substantial pecuniary injury, the Arbitral Tribunal finally disposing of the said matter shall direct whether any of the expenses of the successful Party shall be borne by the unsuccessful Party, and, if so, to what extent.

ART. XIII.—The time and place of meeting of an Arbitral Tribunal, and all arrangements for the hearing and all questions of procedure, shall be decided by the Tribunal itself.

Each Arbitral Tribunal shall keep a correct record of its proceedings, and may appoint and employ all necessary officers and agents.

The decision of the Tribunal shall, if possible, be made within three months from the close of the arguments on both sides.

It shall be made in writing and dated, and shall be signed by the arbitrators who may assent to it.

The decision shall be in duplicate, one copy whereof shall be delivered to each of the High Contracting Parties through their respective agents.

ART. XIV.—This Treaty shall remain in force for five years from the date at which it shall come into operation,

and further until the expiration of twelve months after either of the High Contracting Parties shall have given notice to the other of its wish to terminate the same.

ART. XV.—The present Treaty shall be duly ratified by His Britannic Majesty, and by the President of the United States of America, by and with the advice and consent of the Senate thereof; and the mutual exchange of ratifications shall take place in London or in Washington within six months of the date hereof, or earlier if possible.

In faith whereof, we, the respective Plenipotentiaries, have signed this Treaty, and have hereunto affixed our seals.

Done in duplicate at Washington, the 11th day of January 1897.

(Signed) JULIAN PAUNCEFOTE. (Seal.)
(Signed) RICHARD OLNEY. (Seal.)

V

ANGLO-FRENCH (OCTOBER 14, 1903) AND ANGLO-AMERICAN (DECEMBER 12, 1904) TREATIES OF ARBITRATION AND NOTE[1] THEREON

BELOW is the text of the Anglo-American Treaty signed by the late Hon. John Hay and by Sir Mortimer Durand on December 12, 1904, and submitted shortly after by President Roosevelt to the Senate of the United States for ratification. The Senate inserted in Article II. the word "Treaty" in the place of the word "Agreement." With this alteration they returned it to the President, who considered the alteration left him no alternative but to consider the Treaty and the other similar Treaties which had been negotiated as cancelled. Alongside the text of the Anglo-American Treaty I place, for comparison, that of the Anglo-French Treaty:

ANGLO-AMERICAN TREATY OF DEC. 12, 1904	ANGLO-FRENCH TREATY OF OCT. 14, 1903
The United States of America, etc., signatories of the Convention for the pacific settlement of international disputes, concluded at the Hague on July 29, 1899,	The Government of the French Republic and the Government of H.B. Majesty, signatories of the Convention for the pacific settlement of international disputes, concluded at the Hague, July 29, 1899,
Taking into consideration	Considering that by Article

[1] This Note was printed as a private memorandum and dated July 3, 1905.

that by Article XIX.[1] of that Convention the High Contracting Parties have reserved to themselves the right of concluding Agreements with a view to referring to arbitration all questions which they shall consider possible to submit to such treatment,

Have appointed their respective Plenipotentiaries, namely :

Who, after having communicated each to the other their respective full powers in good and due form, have agreed upon the following Articles :—

ART. I.—Differences which may arise of a legal nature, or relating to the interpretation of Treaties existing between the two Contracting Parties, and which it may not have been possible to settle by diplomacy, shall be referred to the permanent Court of Arbitration established at the Hague by the Convention of July 29, 1899, provided, nevertheless that they do not

XIX. of this Convention the High Contracting Parties reserved to themselves the conclusion of Agreements in view of recourse to arbitration in all cases which they judged capable of submission to it,

Have authorised the undersigned to agree as follows :

ART. I.—Differences of a judicial order, or relating to the interpretation of existing Treaties between the two Contracting Parties, which may arise, and which it may not have been possible to settle by diplomacy, shall be submitted to the permanent Court of Arbitration, established by the Convention of July 29, 1899, at the Hague, on condition, however, that

[1] Art. XIX. of the Convention of July 29, 1899, for the Pacific Settlement of International Disputes is as follows : " Independently of general or special Treaties, which may already impose the obligation upon the Signatory Powers to have recourse to arbitration, these Powers reserve to themselves the liberty to conclude either before the ratification of the present Act, or afterwards, new Agreements, general or particular, *with the object of extending compulsory arbitration to all cases which they judge capable of being submitted to it.*"

affect the vital interests, the independence or the honour of the two Contracting States, and do not concern the interests of third Parties.

ART. II.—In each individual case the High Contracting Parties, before appealing to the permanent Court of Arbitration, shall *conclude a special Agreement* defining clearly the matter in dispute and the scope of the powers of the arbitrators, and fixing the periods for the formation of the Arbitral Tribunal, and the several stages of the procedure.

ART. III.—The present Convention *shall be ratified by the President of the United States of America by and with the advice and consent of the Senate thereof*, and by . The ratifications shall be exchanged at Washington as soon as possible, and the Convention shall take effect on the date of the exchange of its ratifications.

ART. IV.—The present Convention is concluded for a period of five years, dating from the day of the exchange of its ratifications.

neither the vital interests, nor the independence or honour of the two Contracting States, nor the interests of any State other than the two Contracting States, are involved.

ART. II.—In each particular case the High Contracting Parties, before addressing themselves to the permanent Court of Arbitration, *shall sign a special undertaking* [in French — *compromis*] determining clearly the subject of dispute, the extent of the arbitral powers, and the periods to be observed in the constitution of the Arbitral Tribunal, and the procedure.

ART. III.—The present arrangement is concluded for a duration of five years from the date of signature.

The essential points in the two texts are distinguished by italics.

The questions in connection with these Treaties to which attention is drawn are :

1. Whether Article II. in both Treaties is necessary or useful.

2. Whether Article III. in the Anglo-American text is not beyond the scope of an International Treaty.

3. And, if so, whether a way cannot be found of meeting the Senate's objections, without introducing a constitutional question of purely domestic interest into an arrangement with other Powers.

I will deal with them in the above order.

I. Article II. is a reproduction of Article XXXI. of the Hague Convention. It figures therein under the heading of "Arbitral Procedure," and it was, in fact, borrowed from the ordinary procedure in arbitration practice. Article XXXI. is as follows :

> "The Powers which have recourse to arbitration sign a special act [*compromis*] in which are clearly set out the matter in dispute as well as the scope of the powers of the arbitrators."

Why M. Delcassé, who drew up the form which was with slight modifications ultimately adopted, thought it desirable to again insert the clause in the supplementary Convention is not clear, seeing that all the latter was intended to do was, as is therein indicated, to make reference to arbitration obligatory in certain cases.

All the signatories of the Peace Convention have already sanctioned and agreed to the procedure of the Hague Court, and it is mere redundance to repeat in a supplementary Convention the first step in such procedure. The necessity of laying the precise points in question before the arbitrators, as before judges in our domestic Courts, is too obvious to need to be argued. It is required in every system of judicial procedure, and, in the nature of things, it is the first detail to be settled, after the principle of arbitration itself has been agreed to by the Parties. One might go further, and say that this precise determination of the issue belongs to all kinds of procedure. Thus it belongs to what in diplomacy

are called the protocols of a question. Foreign offices are constantly reducing matters of difference to writing, and whittling them down to their simplest expression in ways binding on their respective countries, without such protocols being considered as Treaties or Conventions. In short, if the second Article had been omitted from the Anglo-French Treaty, it would have made no change, seeing that it is included in the general Convention, and if no such clause had been inserted in the general Convention, diplomatic necessity and usage, in the very nature of things, would have led the Governments before they resorted to arbitration to define the precise issue to be adjudicated upon, and any other details and procedure which have necessarily to be determined *in limine litis*.

II. I submit that the mode of ratification cannot properly figure among the contents of an International Treaty. It is essentially a matter for internal legislation. Article III., in stipulating that the Treaty shall be ratified by the President of the United States *by and with the advice and consent of the Senate thereof*, imports into it an element foreign to the idea of a Sovereign State. A State in its outward relations is represented by its Executive alone. It is undesirable to give foreign States the remotest justification for inquiring into the legitimacy of the Executive in possession of the direction of a nation's external action.

The introduction of the word "Treaty" instead of "Agreement" would probably have made Parliamentary ratification necessary by practically all States except Great Britain. Why, however, should other nations be compelled, if they do not wish to do so, to submit each individual act of reference for Parliamentary ratification? This shows how unquestionably the subject of Parliamentary ratification is one affecting the domestic relations of each contracting country exclusively.

III. But the difficulty, in spite of the suppression of Article II., and of the ratification clause, might still subsist in the view of a number of Senators, for whom the main point appears to be that no reference whatsoever to arbitration shall be made without some kind of sanction by the Senate. The point, I may mention, is not new.

In the Anglo-American Treaty of Arbitration of 1897 there was no such clause as Article II. The Senate, when the Treaty was submitted for their ratification, added a clause almost identically in the sense of the modification they have made in the new Treaties. The proviso they added was: "And any agreement to submit, together with its formulations, shall in every case, before it becomes final, be communicated by the President of the United States to the Senate with his approval, and be concurred in by two-thirds of the Senators present."

It is seen that the Senate did not depart from the attitude they assumed eight years before, and the question is how to meet their requirements without touching the procedure of the Hague Court under the existing Convention.

The matter belongs purely to the domain of domestic or constitutional law, and I approach it with all the humility of an outsider. The American Senate has a position in the American polity quite different from that of any of the Upper Houses in Europe. Its executive functions permit it to exercise a check on the administrative authority in all external matters, and it is no doubt jealous of any action which might in the least diminish such powers.

With all deference, I submit that, in the enactment ratifying the Treaty, the Senate might have inserted such provisions as it deemed desirable for the restriction of the Presidential Powers. It is surely possible to provide some method of dealing with the details of a reference to arbitration in secret executive sitting without dragging either the public at home or abroad or the other Power or Powers concerned into the discussion. I also humbly submit that it seems to me, as an outsider, possible to require that the appointment of the American arbitrators, in each individual case, shall be laid before the Senate for its approval, under its constitutional privilege of ratification of appointments in the Diplomatic Service. Inasmuch as under the Hague Convention arbitrators are assimilated to chiefs of diplomatic missions, might not the President and Senate agree that this assimilation be recognised as between them ?

VI

ARBITRATION CONVENTION BETWEEN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA

Signed at Washington, April 4, 1908

[*Ratifications exchanged at Washington, June* 4, 1908]

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, and the President of the United States of America, desiring in pursuance of the principles set forth in Articles XV.–XIX. of the Convention for the pacific settlement of international disputes, signed at the Hague, July 29, 1899, to enter into negotiations for the conclusion of an Arbitration Convention, have named as their Plenipotentiaries, to wit :

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, The Right Honourable James Bryce, O.M., and

The President of the United States of America, Elihu Root, Secretary of State of the United States,

Who, after having communicated to one another their full powers, found in good and due form, have agreed upon the following Articles :

Art. I.—Differences which may arise of a legal nature or relating to the interpretation of Treaties existing between the two Contracting Parties and which it may not have been possible to settle by diplomacy, shall be referred to the per-

manent Court of Arbitration established at the Hague by the Convention of July 29, 1899, provided, nevertheless, that they do not affect the vital interests, the independence or the honour of the two Contracting States, and do not concern the interests of third Parties.

ART. II.—In each individual case the High Contracting Parties, before appealing to the permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure. It is understood that such special Agreements on the part of the United States will be made by the President of the United States, by and with the advice and consent of the Senate thereof; His Majesty's Government reserving the right before concluding a special Agreement in any matter affecting the interests of a self-governing Dominion of the British Empire to obtain the concurrence therein of the Government of that Dominion.

Such Agreements shall be binding only when confirmed by the two Governments by an Exchange of Notes.

ART. III.—The present Convention shall be ratified by His Britannic Majesty, and by the President of the United States of America by and with the advice and consent of the Senate thereof. The ratifications shall be exchanged at Washington as soon as possible, and the Convention shall take effect on the date of the exchange of its ratifications.

ART. IV.—The present Convention is concluded for a period of five years, dating from the date of the exchange of its ratifications.

Done in duplicate at the City of Washington, this fourth day of April, in the year 1908.

(Signed) JAMES BRYCE.
(Signed) ELIHU ROOT.

VII

ANGLO-AMERICAN TREATY OF ARBITRATION AND CONCILIATION

Signed at Washington, August 3, 1911

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being equally desirous of perpetuating the peace, which has happily existed between the two nations, as established in 1814 by the Treaty of Ghent, and has never since been interrupted by an appeal to arms, and which has been confirmed and strengthened in recent years by a number of Treaties whereby pending controversies have been adjusted by Agreement or settled by arbitration or otherwise provided for; so that now, for the first time, there are no important questions of difference outstanding between them, and being resolved that no future differences shall be a cause of hostilities between them or interrupt their good relations and friendship;

The High Contracting Parties have therefore determined, in furtherance of these ends, to conclude a Treaty extending the scope and obligations of the policy of arbitration adopted in their present Arbitration Treaty of April 14, 1908, so as to exclude certain exceptions contained in that Treaty and to provide means for the peaceful solution of all questions of difference which it shall be found impossible in future to settle by diplomacy, and for that purpose they have appointed as their respective Plenipotentiaries:

The President of the United States of America, the Honour-

able Philander C. Knox, Secretary of State of the United States; and His Britannic Majesty, the Right Honourable James Bryce, O.M., his Ambassador Extraordinary and Plenipotentiary at Washington; who, having communicated to one another their full powers, found in good and due form, have agreed upon the following Articles:

ART. I.—All differences hereafter arising between the High Contracting Parties which it has not been possible to adjust by diplomacy, relating to international matters in which the High Contracting Parties are concerned by virtue of a claim of right made by one against the other under Treaty or otherwise, and which are justiciable in their nature by reason of being susceptible of decision by the application of the principles of law or equity, shall be submitted to the permanent Court of Arbitration established at the Hague by the Convention of October 18, 1907, or to some other Arbitral Tribunal as may be decided in each case by special Agreement, which special Agreement shall provide for the organisation of such Tribunal, if necessary, define the scope of the powers of the arbitrators, the question or questions at issue, and settle the terms of reference and the procedure thereunder.

The provisions of Articles XXXVII.–XC., inclusive, of the Convention for the pacific settlement of international disputes concluded at the second Peace Conference at the Hague on October 18, 1907, so far as applicable and unless they are inconsistent with or modified by the provisions of the special Agreement to be concluded in each case, and excepting Articles LIII. and LIV. of such Convention, shall govern the arbitration proceedings to be taken under this Treaty.

The special Agreement in each case shall be on the part of the United States by the President of the United States, by and with the advice and consent of the Senate thereof, His Majesty's Government reserving the right before concluding a special Agreement in any matter affecting the interests of a self-governing dominion of the British Empire to obtain the concurrence therein of the Government of that dominion.

Such Agreement shall be binding when confirmed by the two Governments by an exchange of Notes.

ART. II.—The High Contracting Parties further agree to institute, as occasion arises and as hereinafter provided, a Joint High Commission of Inquiry, to which, upon the request of either Party, shall be referred for impartial and conscientious investigation any controversy between the Parties within the scope of Article I. before such controversy has been submitted to arbitration, and also any other controversy hereafter arising between them, even if they are not agreed that it falls within the scope of Article I. ; provided, however, that such reference may be postponed until the expiration of one year after the date of the formal request therefor, in order to afford an opportunity for diplomatic discussion and adjustment of the questions in controversy, if either Party desires such postponement.

Whenever a question or matter of difference is referred to the Joint High Commission of Inquiry, as herein provided, each of the High Contracting Parties shall designate three of its nationals to act as members of the Commission of Inquiry for the purposes of such reference ; or the Commission may be otherwise constituted in any particular case by the terms of reference, the membership of the Commission and the terms of reference to be determined in each case by an exchange of Notes.

The provisions of Articles IX. to XXXVI., inclusive, of the Convention for the pacific settlement of international disputes concluded at the Hague on October 18, 1907, so far as applicable, and unless they are inconsistent with the provisions of this Treaty, or are modified by the terms of reference agreed upon in any particular case, shall govern the organisation and procedure of the Commission.

ART. III.—The Joint High Commission of Inquiry instituted in each case, as provided for in Article II., is authorised to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate.

The reports of the Commission shall not be regarded as decisions of the questions or matters so submitted, either on the facts or on the law, and shall in no way have the character of an Arbitral Award.

It is further agreed, however, that in cases in which the Parties disagree as to whether or not a difference is subject to arbitration under Article I. of this Treaty, that question shall be submitted to the Joint High Commission of Inquiry; and if all or all but one of the members of the Commission agree and report that such difference is within the scope of Article I. it shall be referred to arbitration in accordance with the provisions of this Treaty.

ART. IV.—The Commission shall have power to administer oaths to witnesses and take evidence on oath whenever deemed necessary in any proceeding, or inquiry, or matter within its jurisdiction under this Treaty; and the High Contracting Parties agree to adopt such legislation as may be appropriate and necessary to give the Commission the powers above mentioned and to provide for the issue of subpœnas and for compelling the attendance of witnesses in the proceedings before the Commission.

On the inquiry both sides must be heard, and each Party is entitled to appoint an agent, whose duty it shall be to represent his Government before the Commission and to present to the Commission, either personally or through counsel retained for that purpose, such evidence and arguments as he may deem necessary and appropriate for the information of the Commission.

ART. V.—The Commission shall meet whenever called upon to make an examination and report under the terms of this Treaty, and the Commission may fix such times and places for its meetings as may be necessary, subject at all times to special call or direction of the two Governments. Each commissioner, upon the first joint meeting of the Commission after his appointment, shall, before proceeding with the work of the Commission, make and subscribe a solemn declaration in writing that he will faithfully and impartially perform the duties imposed upon him under this Treaty, and

such declaration shall be entered on the records of the proceedings of the Commission.

The United States and British sections of the Commission may each appoint a secretary, and these shall act as joint secretaries of the Commission at its joint sessions, and the Commission may employ experts and clerical assistants from time to time, as it may deem advisable. The salaries and personal expenses of the Commission and of the agents and counsel and of the secretaries shall be paid by their respective Governments, and all reasonable and necessary joint expenses of the Commission incurred by it shall be paid in equal moieties by the High Contracting Parties.

ART. VI.—This Treaty shall supersede the arbitration Treaty concluded between the High Contracting Parties on April 4, 1908, but all Agreements, Awards, and proceedings under that Treaty shall continue in force and effect, and this Treaty shall not affect in any way the provisions of the Treaty of January 11, 1909, relating to questions arising between the United States and the Dominion of Canada.

ART. VII.—The present Treaty shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty. The ratifications shall be exchanged at Washington as soon as possible, and the Treaty shall take effect on the date of the exchange of its ratifications. It shall thereafter remain in force continuously, unless and until terminated by twenty-four months' written notice given by either High Contracting Party to the other.

In faith whereof the respective Plenipotentiaries have signed this Treaty in duplicate, and have hereunto affixed their seals.

Done at Washington, the third day of August, in the year of our Lord one thousand nine hundred and eleven.

PHILANDER C. KNOX.
JAMES BRYCE.

VIII

TREATY OF ARBITRATION BETWEEN FRANCE AND DENMARK

Signed August 9, 1911

(Translation)

The President of the French Republic and His Majesty the King of Denmark, signatories of the Convention for the peaceful settlement of international disputes concluded at the Hague, October 18, 1907 ;

Whereas, by Article XL. of said Convention, the High Contracting Parties have reserved unto themselves the right to conclude Agreements "with the view of extending obligatory arbitration to all cases that they shall judge possible for submission thereto " ;

Whereas, the second Peace Conference was unanimous in recognising in the Final Act the principle of obligatory arbitration, and in declaring that certain disputes are susceptible to be submitted unreservedly to obligatory arbitration ;

Have resolved to conclude a Convention establishing these principles, and named as their Plenipotentiaries :

The President of the French Republic : M. Charles Prosper Maurice Horric de Beaucaire, Envoy Extraordinary and Minister Plenipotentiary of the French Republic to Copenhagen ;

His Majesty the King of Denmark : His Excellency, M. le Comte Carl William Ahlefeldt Laurvig, his Minister of Foreign Affairs ;

Who, duly authorised, have agreed upon the following Articles :

ART. I.—Differences of a juridical nature, and, particularly, those regarding the interpretation of Treaties existing between the two Contracting Parties, which may hereafter arise between them and not be settled by diplomacy, shall be submitted to arbitration in the terms of the Convention for the peaceful settlement of international disputes, signed at the Hague, October 18, 1907, with the condition, however, that they affect neither the vital interests, nor the independence nor the honour of the one or the other of the Contracting States, and that they do not affect the interests of third Powers.

ART. II.—Differences relating to the following questions shall be submitted to arbitration, and the reservations mentioned, under Article I., shall not be invoked in regard to them :

I. Pecuniary claims under the head of damages when the principle of indemnification is recognised by the Parties ;

II. Contractual debts claimed against the Government of one of the Parties by the Government of the other Party as due to its citizens ;

III. The interpretation and application of conventional stipulations relating to commerce and navigation ;

IV. The interpretation and application of conventional stipulations relating to the following matters :

Industrial property ;

Literary and artistic property ;

International private law regulated by the Conventions of the Hague ;

International protection of working men ;

Posts and telegraphs ;

Weights and measures ;

Sanitary questions ;

Submarine cables ;

Fisheries ;

Gauging of vessels ;

White slave traffic.

In differences relating to the matters referred to in No. IV.

of the present Article, and over which, according to the territorial law, the judicial authority has jurisdiction, the Contracting Parties have the right to submit the dispute to arbitration only after the national jurisdiction has given a final decision. The arbitral decisions rendered in the cases referred to in the preceding paragraph shall have no effect upon anterior judicial decisions. The Contracting Parties pledge themselves to take, or, in case of need, propose to the legislature, the necessary measures, so that the interpretation given by the arbitral decision in the cases referred to above may, in fact, be binding upon their Tribunals.

ART. III.—In each special case the High Contracting Parties shall sign a special protocol (*compromis*) clearly indicating the subject of the dispute, the scope of the power of the arbitrators, the procedure and the time limits to be observed in regard to the operations of the Arbitral Tribunal. The Contracting Parties agree to confer upon the Arbitral Tribunal defined in the present Convention the power to decide, in case of disagreement between themselves, if a difference which has arisen between them belongs to the category of differences to be submitted to obligatory arbitration in conformity with Articles I. and II. of the present Convention.

ART. IV.—If within the year that follows the notification by the more diligent Party of a project of protocol (*compromis*) the High Contracting Parties are not successful in reaching an agreement regarding the measures to be taken, then the permanent Court shall be competent to draw up the Agreement. Application for such purpose may be made by only one of the Parties. The protocol (*compromis*) shall be settled in conformity with the provisions of Articles LIV. and XLV. of the Convention of the Hague for the peaceful settlement of international disputes of October 18, 1907.

ART. V.—The present Convention is concluded for the period of five years, and shall run on for like periods of five years, dating from the exchange of the ratifications, unless notice to the contrary be given.

ART. VI.—The present Convention shall be ratified as

early as possible and the ratifications thereof exchanged at Copenhagen.

Done at Copenhagen in duplicate, August 9, 1911.

(L.S.) HORRIC DE BEAUCAIRE.

(L.S.) C. W. AHLEFELDT LAURVIG.

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